Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JACK WARREN DAVIS
Petitioner,

v.

THE STATE OF TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED FOR REVIEW
CAPITAL CASE

1. **Whether the Double Jeopardy Clause of the Fifth Amendment, U. S. CONST. amend. V, made applicable to the States through the Fourteenth Amendment, U. S. CONST. amend. XIV, bars retrial of Petitioner following the reversal of his conviction when the prosecutor engaged in misconduct intended to prevent an acquittal he believed was likely to occur absent the misconduct.**

2. **Whether the Supreme Court should extend its holding in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), to include some reversals based upon prosecutorial misconduct.**

LIST OF INTERESTED PARTIES

The parties to this petition for writ of certiorari are:

1. Jack Warren Davis,
   Defendant-Petitioner.

2. The State of Texas,
   Plaintiff-Respondent.

3. The Hon. James Ramsey, in his official capacity as Judge of the 22nd Judicial District Court of Comal County, Texas, trial judge.

4. The Hon. Ray Taylor, in his official capacity as the Special Prosecutor, Comal County, Texas, attorney for the State of Texas.

5. The Hon. Dan Morales, in his official capacity as Attorney General of Texas, attorney for the State of Texas.

6. Stanley G. Schneider,
   Attorney for Petitioner.

These representations are made so that the Justices of this Court may immediately determine if they are disqualified or should recuse themselves.

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, **JACK WARREN DAVIS,** by and through his attorney, **STANLEY G. SCHNEIDER,** files this petition for writ of certiorari pursuant to SUP. CT. R. 12. In support of this petition, Petitioner will show the Court the following:

I. STATEMENT OF JURISDICTION

This is a petition for writ of certiorari to the Texas Court of Criminal Appeals in a criminal case. The Court of Criminal Appeals is the court of last resort in Texas for criminal cases. TEX. CONST. art. V, § 5. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Petitioner was charged with capital murder in the 22nd Judicial District Court of Comal County, Texas, in Cause Number Cr-89-251. Because the jury was unable to arrive at an answer to Special Issue Number One, the trial court sentenced Petitioner to life in prison on May 17, 1990. On June 10, 1990, Petitioner filed a timely motion for new trial. The trial court did not hold a hearing on the motion, which was overruled by operation of law. Petitioner filed timely written notice of appeal.

The Third Court of Appeals of Comal County, Texas, reversed Petitioner's conviction on three grounds. *Davis v. State*, 831 S.W.2d 426 (Tex. App.--Austin 1992, pet. ref'd).[1] The court of appeals found that Bill Reimer, the elected District Attorney of Comal County, Texas, violated Petitioner's Sixth Amendment right to compulsory process by intimidating a defense witness. It also found that Reimer knowingly used perjured testimony in that he knew that the intimidated witness was lying in the presence of the jury by testifying that she had first contacted the district attorney's office to change her previous testimony

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[1] A copy of the opinion is attached as Appendix A.

when in fact that was not true. *See generally Davis*, 831 S.W.2d at 437-39.

The court of appeals held:

> **Accordingly, the trial court erred in denying appellant's motion for mistrial.**

Id. at 439-40 (emphasis added).

After the court of appeals issued the mandate of reversal, Petitioner filed a pretrial writ of habeas corpus alleging that any retrial is barred by the double jeopardy provisions of the United States and Texas Constitutions and because the State deprived him of due process by the intentional destruction of exculpatory evidence and the intentional use of perjured testimony to obtain his conviction. The trial court issued the writ and convened an evidentiary hearing. The trial court entered findings of fact and conclusions of law and denied the writ. Petitioner gave timely written notice of appeal.

On February 8, 1995, in a published opinion, the Third Court of Appeals affirmed the trial court's denial of habeas relief. *Ex parte Davis*, 893 S.W.2d 252 (Tex. App.--Austin 1995). Petitioner filed a timely motion for rehearing, which the court of appeals overruled on March 15, 1995. On September 17, 1997, the Texas Court of Criminal Appeals affirmed the court of appeals' decision in a published opinion. *Ex parte Davis*, No. 495-95 (Tex. Crim. App. Sept. 17, 1997).[2] The Court of Criminal Appeals overruled Petitioner's motion for rehearing on October 15, 1997.[3] This petition is due to be filed on or before January 13, 1998.

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[2] A copy of the opinion is attached as Appendix B.

[3] A copy of the court's docket sheet showing the overruling of rehearing is attached as Appendix C.

II. CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are:

1. U. S. CONST. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U. S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. CONCISE STATEMENT OF RELEVANT FACTS

Petitioner's conviction was reversed by the Third Court of Appeals of Comal County, Texas, on three grounds, only two of which

are relevant to this petition.[4] The court of appeals first found that Bill Reimer, the elected District Attorney of Comal County, Texas, violated Petitioner's Sixth Amendment right to compulsory process by intimidating a defense witness. It then found that Reimer knowingly used perjured testimony in that he knew that the intimidated witness was lying in the presence of the jury by testifying that she had first contacted the district attorney's office to change her previous testimony when in fact that was not true. *See generally Davis*, 831 S.W.2d at 437-39. The court of appeals held that the trial court should have granted Petitioner's motion for mistrial based upon this prosecutorial misconduct.

At trial, Carolyn Toth, the manager of the apartment complex where Petitioner worked and the murder took place, testified generally that she had seen the victim's sister, Karen Balonis, embrace Petitioner shortly after the offense was discovered. The day after she testified for the defense, the State recalled Toth to recant her testimony. Toth agreed with a question posed by Reimer that she had contacted his office to change her testimony.

After learning that Reimer had threatened Toth with a perjury indictment if her original testimony were found to be false, Petitioner's counsel moved for a mistrial. At the hearing on the motion, outside the jury's presence, Toth testified that she changed her testimony because of Reimer's threats and intimidation and that she testified falsely about contacting Reimer to change her testimony. The trial court denied Petitioner's motion for mistrial but instructed the jury to disregard Toth's statements the second time she testified.

Subsequent to his trial, Petitioner learned about the conduct of Fred Zain, the State's forensic expert. Following the evidentiary hearing, the trial court entered the following findings of fact and

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[4] The ground that is not relevant to this petition regards the taking of a blood sample based upon a search warrant not supported by probable cause. *Davis*, 831 S.W.2d at 441. This ground does not implicate Petitioner's double jeopardy or due process rights sufficiently to bar a retrial.

conclusions of law regarding Zain:

> The Court, having heard the evidence presented at the hearing on Appellant's application for writ of habeas corpus, having seen the witnesses testify, judged their credibility and being fully informed, enters the following findings of fact and conclusions of law:
>
> **FINDINGS OF FACT**
>
> **A. Fred Zain's Testimony**
>
> 1. Fred Zain was an employee of the Bexar County Forensic Science Center who testified for the State in Applicant's trial.
>
> 2. Comal County paid the Bexar County Medical Examiner for Zain's services as an expert witness and not for the performance of any scientific testing of evidence in Applicant's trial.
>
> 3. Zain testified at the trial that he performed the scientific tests on blood and other evidence in connection with this case.
>
> 4. Zain did in fact not conduct the DNA tests noted in his report.
>
> 5. It is highly probable that Zain committed aggravated perjury in testifying at Applicant's trial concerning the results of some or all of the scientific tests he said he conducted. Specifically, Zain committed aggravated perjury in the following ways:
>
> a. He testified that he had personally conducted scientific tests

when in fact he did not.

b. He testified that certain pieces of physical evidence contained Applicant's blood when in fact he knew or should have known that these pieces of evidence did not contain Applicant's blood.

6. Zain is not credible under oath.

7. At the hearing on Applicant's application for writ of habeas corpus, Zain invoked his right against self incrimination as guaranteed by the Fifth Amendment after being admonished of his rights by the trial court and after admitting that his employment had been terminated because of evidence in his possession being lost.

8. Zain's scientific evidence was not reliable.

9. Zain's reports and testimony served as the basis for the opinions, testimony and conclusions of Lt. Ed Richards.

10. The State's theory of prosecution was premised on the testimony of Lt. Richards and Zain. Zain misled Lt. Richards regarding the forensic facts, thus causing Lt. Richards' testimony and conclusions to be probably inaccurate.

11. Zain was employed by the Comal County District Attorney to conduct the serology testing of the evidence in this case.

12. Zain's conduct was intentional and outrageous and shocked the conscience of the court.

13. The Court is familiar with the holdings of the West Virginia Supreme Court in *The Matter of the West Virginia State Police State Police Crime Laboratory Serology Division*, No. 93-Misc.-402 (W. Va. Nov. 10, 1993) (not yet reported).[5] The Court agrees with the general fact findings of the West Virginia Supreme Court concerning Zain's competence, abilities and reliability and finds that there is a significant danger that similar conduct occurred in Texas.

14. Zain was terminated from the Bexar County Forensic Science Center for mishandling of evidence and because of the result of Dr. Stone's audit.

B. Bill Reimer's Actions

1. Bill Reimer is the elected district attorney of Comal County, Texas.

2. Reimer, acting in his official capacity as district attorney of Comal County, personally prosecuted Applicant at his first trial.

3. Reimer has disqualified himself from further prosecution in this cause and Ray Taylor has been named special district attorney to prosecute Applicant and Taylor is completely independent of the Comal County District Attorney's Office.

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[5] Subsequent to the evidentiary hearing and the entry of the trial court's findings, the opinion was reported at 438 S.E.2d 501.

4. The Court of Appeals has found that Reimer engaged in prosecutorial misconduct and suborned perjury. That finding is binding upon this Court and is accepted herein and that finding serves as a basis for this Court's conclusions of law. See generally, *Davis v. State*, 831 S.W.2d 426 (Tex. App.--Austin 1992, pet. ref'd).

5. Reimer presented the following facts to the jury in Applicant's trial:

> a. Certain evidence was not tested because of the cost to Comal County. This statement was incorrect because Comal County only paid for Zain's testimony.
>
> b. That the police investigation was excellently conducted and outstanding while before the trial he wrote New Braunfels city officials complaining of the lost evidence and negligence of the police investigation.

C. Irregularities Regarding the Evidence

1. The New Braunfels Police Department erased a tape recorded statement of Marci French made the night of the homicide.

2. Alda Hanus claims that Marci French on the night of the homicide said she saw a man going down the stairs of the apartment with long stringy hair wearing a white T-shirt and jeans while Marci French denies making the statement.

3. The description given by Alda Hanus matches the description that Applicant gave of the person he saw leaving the victim's apartment.

4. Hairs found in the victim's hands were lost.

5. Blood samples taken from the victim's body were stored in such a manner that they were incapable of being used as known samples in scientific testing.

6. To provide "known samples" of the victim's blood, Zain selected certain blood stains from evidence and declared them to be the known samples of the victim's blood.

Ex parte Davis, 893 S.W.2d 252, 258-59 (Tex. App.--Austin 1995).

IV. REASONS FOR REVIEW

A. Summary of the Argument

Every federal appellate court that has reviewed Petitioner's claim has recognized that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution should protect a defendant from a second trial when his conviction has been reversed on appeal because of intentional prosecutorial misconduct aimed at securing an otherwise unlikely conviction. This Court should settle the issue left open by *Oregon v. Kennedy* and extend its holding to include some reversals caused by prosecutorial misconduct.

In this case, Petitioner's conviction was reversed on direct appeal due to the prosecutor's violation of Petitioner's Sixth Amendment right to compulsory process by intimidating a witness to commit perjury and by the knowing use of that perjured testimony. The

prosecutor also made several false representations to the court concerning his conduct with the perjurious witness. In light of the prosecutor's egregious misconduct in this case, the double jeopardy guarantees of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, should bar any retrial. Certiorari should be granted in this case to decide this important question.

Because Petitioner's issues are two sides of the same coin, he discusses them together.

B. History of Double Jeopardy Analysis and Mistrials Due to Prosecutorial Misconduct

Every person is entitled to one fair trial. Petitioner was deprived of his fair trial by the intentional misconduct of Bill Reimer, the elected District Attorney of Comal County, Texas. In this case, the intentional misconduct was not limited to the action of the trial prosecutor, Bill Reimer, but extended to the acts of the State's forensic expert, Fred Zain, who committed aggravated perjury, falsified evidence, and suppressed exculpatory evidence.

Having deliberately and intentionally deprived Petitioner of his fair trial, Petitioner asserts that the conduct of the trial prosecutor and his investigative team was so egregious that it deprived Petitioner of his rights protected by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Accordingly, retrial in this case should be barred.

The Double Jeopardy Clause protects a defendant in criminal proceedings against multiple punishments or repeated prosecutions for the same offense. The Double Jeopardy Clause is not implicated unless jeopardy has attached -- that is, until a jury has been sworn or until a court has begun to receive evidence.[6] *Crist v. Bretz*, 437 U.S. 28, 98

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[6] In Texas, as a matter of independent state law, jeopardy attaches in a court trial once both sides have announced ready and the defendant has entered his plea to the information or indictment. *Ochoa v. State*, 492

S.Ct 2156, 57 L.Ed.2d 24 (1978). Once jeopardy has attached, a dismissal or a mistrial may implicate double jeopardy concerns.[7]

Historically, double jeopardy analysis has begun by determining whether the initial trial was terminated at the request or with the consent of the defendant. Where trial is terminated over the objection of the defendant, a second trial may not be had unless there was manifest necessity justifying termination of the first proceeding. *United States v. Perez*, 23 U.S. (9 Wheat) 579, 580, 6 L.Ed. 165 (1824); *see also Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416 (1982).

Conversely, where the first trial terminates at the defendant's request or with his consent, the Double Jeopardy Clause does not generally bar a retrial. *Oregon v. Kennedy*, 456 U.S. at 673-674, 102 S.Ct. at 2088. However, even when a mistrial is granted at the defendant's request or with his consent, jeopardy will bar a retrial if the prosecutor intentionally goaded the defendant into requesting termination of the first proceeding in an effort either to insure that the first trial would end, improperly, without any chance of acquittal or to obtain a future, potentially more favorable trial. It is this exception that Petitioner contends is applicable to the instant case and bars his retrial.

In *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961), this Court declined to prohibit a retrial when the first trial ended by the trial court's *sua sponte* mistrial declaration. In large part, the opinion in *Gori* turns on the fact that the appellate courts believed that the trial judge was acting to protect the defendant's interests from what was about to be prosecutorial misconduct. Viewed

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S.W.2d 576 (Tex. Crim. App. 1973).

[7] With some exceptions not relevant here, the Supreme Court has generally treated post-jeopardy dismissals the same as mistrials. Thus, for the purposes of this petition, references to mistrials include mistrials and dismissals. Similarly, the Court has not drawn any distinctions between relief afforded during a trial and after judgment. *See United States v. Tateo*, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed. 448 (1964).

in this context, this Court was not willing, on the partial record it had, to second guess the trial court's decision that a mistrial was appropriate to protect the defendant's rights.

In *United States v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964), the Court first suggested that there were circumstances under which prosecutorial or judicial impropriety would bar a subsequent prosecution under the Double Jeopardy Clause. In the words of the Court:

> If there were any intimation in a case that if prosecutorial or judicial impropriety justifying a mistrial resulted from a fear [by the prosecution] that the jury was likely to acquit the accused, different considerations would, of course, obtain.

Id., 377 U.S. at 468, 84 S.Ct. at 1590.

Factually, the Court in *Tateo* was faced with a post-judgment collateral attack that had resulted in the first conviction being vacated because the guilty plea, which had been entered on the fourth day of the first trial, had been coerced by the trial court's indication that if the defendant were convicted the court would impose a life sentence with other sentences stacked on top of it. This Court refused to prohibit a second trial because of the then existing general rule that one who obtains a new trial on appeal may not claim a jeopardy bar to a subsequent trial.

Importantly, *Tateo* relied on the now defunct idea that even if a defendant obtained a reversal on the basis of insufficient evidence, he could thereafter be subjected to a second trial. *Id.*, 377 U.S. at 467, 84 S.Ct. at 1590. In light of this Court's reliance on principles that are no longer valid, the ultimate decision is questionable. In any event, *Tateo* did not involve prosecutorial misconduct and certainly not misconduct of any kind as significant as in the instant case.

In *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), the first trial terminated when the trial judge *sua sponte* declared a mistrial after advising four government witnesses that they needed to seek legal advise before testifying. This Court prohibited a second trial because the defendant had been denied his constitutional opportunity to have a single proceeding before a single jury. The Court distinguished *Gori* on the basis that this mistrial was not to protect the defendant but rather the witnesses.[8] Similarly, the Court distinguished *Tateo* on the basis that Tateo had not had a complete trial only because he chose, albeit involuntarily, to terminate the first proceeding and seek post-conviction review, rather than complete the trial and seek appellate review.

Interestingly, the government argued that the mistrial was not occasioned by "bad-faith prosecutorial conduct aimed at triggering a mistrial in order to get another day in court." *Jorn*, 400 U.S. at 482, 91 S.Ct. at 556. At least implicitly, even the government recognized that "bad-faith prosecutorial conduct aimed at triggering a mistrial in order to get another day in court" would bar a subsequent trial. Aside from the government's admissions, this Court in *Jorn*, as it did in *Tateo*, recognized that

> Thus where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.
>
> Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred.

Jorn, 400 U.S. at 485 n.12, 91 S.Ct. at 557 n.12.

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[8] The Court also seemed to express disapproval of the rationale applied in *Gori* but stopped short of overruling it. At best, in light of *Jorn*, *Gori* is limited to its facts and is of doubtful validity today.

The Court plainly recognized and explained that there is a difference for double jeopardy purposes between routine error and "prosecutorial impropriety designed to avoid an acquittal." It is this distinction that applies to this case and bars another trial.

In *United States v. Dinitz*, 424 U.S. 600, 611-12, 96 S.Ct. 1075, 1082, 47 L.Ed.2d 267 (1976), the defendant requested a mistrial after the trial court excluded the defendant's counsel from the courtroom and the courthouse based on defendant's counsel's repeated misconduct during his opening statement. In holding that a retrial was not prohibited by the Double Jeopardy Clause, the Court recognized that ordinarily where a defendant requests a mistrial or exercises his right to appeal, the Double Jeopardy Clause does not prohibit a subsequent prosecution. However, the Court was careful to reiterate that the general rule permitting retrials when a defendant requests a mistrial or new trial is limited by the exception applicable to bad faith prosecutorial conduct. In the words of the Court:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor" *United States v. Jorn, supra*, 400 U.S., at 485, 91 S.Ct., at 557, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.

Dinitz, 424 U.S. at 611, 96 S.Ct. at 1081.

In *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), this Court endeavored to clarify language from earlier cases concerning under what circumstances the exception applicable to terminations at the defendant's request would bar subsequent prosecution. In short, the Court sought to set a standard in

light of the "intent" language and of the "bad-faith, overreaching" language from earlier cases. The plurality held:

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar a retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.

Id., 456 U.S. at 675-76, 102 S.Ct. at 2089.

> [T]he circumstances under which such a defendant may invoke the bar of double jeopardy . . . are limited to those cases in which the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial.

Id., 456 U.S. at 679, 102 S.Ct. at 2091.

Because *Oregon v. Kennedy* was a plurality opinion, one must look to Justice Powell's concurrence to determine the actual holding of the case.[9] In order to understand the impact of Justice Powell's opinion, one must understand that the mistrial in *Oregon v. Kennedy* was declared as the result of the following single question by the prosecutor:

> Prosecutor: Have you ever done business with the Kennedys?
>
> Witness: No, I have not.
>
> Prosecutor: Is that because he is a crook?

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[9] It is well established that in the face of a plurality opinion, the Court's opinion has precedential value only as to the narrowest point on which a majority of justices agree. *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 2923 n.15, 49 L.Ed.2d 859 (1976).

Id., 456 U.S. at 669, 102 S.Ct. at 2086.

Against this backdrop, Justice Powell stated in his concurring opinion:

> I join the Court's opinion holding that the intention of a prosecutor determines whether his conduct, viewed by the defendant as justifying a mistrial, bars a retrial of the defendant under the Double Jeopardy Clause. Because "subjective" intent often may be unknowable, I emphasize that a court -- in considering a double jeopardy motion -- should rely primarily upon the objective facts and circumstances of the particular case.
>
> Nevertheless, this would have been a close case for me if there had been substantial factual evidence of intent beyond the question itself.

Id., 456 U.S. at 679-80, 102 S.Ct. at 2092.

The significance of *Oregon v. Kennedy* is that not only must there be bad-faith, overreaching, and prosecutorial misconduct, but this misconduct must also be such that viewed objectively it leads to a reasonable inference that the prosecutor sought to "provoke a mistrial" so as to obtain a more favorable opportunity to convict in a subsequent proceeding. The desire to obtain a more favorable opportunity is the result of a fear that the jury would be likely to acquit but for the improper conduct. Thus, while "bad-faith" and "overreaching" are not the conclusion of the analysis, they are objective evidence and elements of the requisite intent.

Cases applying the *Oregon v. Kennedy* standard are instructive. In *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976), the court prohibited a retrial on double jeopardy grounds because of the egregiousness of the prosecutor's conduct. In *Kessler*, the court surveyed existing Supreme Court decisions and stated that in order to

invoke the protection of the Double Jeopardy Clause of the Fifth Amendment, a reviewing court must make a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial (or as the basis of appeal) to determine if there was "prosecutorial overreaching." The court stated:

> To find **"prosecutorial overreaching,"** the Government must have through gross negligence or intentional misconduct, caused aggravated circumstances to develop which "seriously prejudice[d] a defendant causing him to reasonably conclude that a continuation of the tainted proceeding would result in conviction.

See also United States v. Broderick, 425 F. Supp. 93 (S.D. Fla. 1977); *People v. Pendleton*, 394 N.E.2d 496, 75 Ill.App.3d 580, 31 Ill. Dec. 294 (1979); *People v. Cavallerio*, 428 N.Y.S. 585, 104 Misc. 2d 436 (1980); *Commonwealth v. Murchison*, 392 Mass. 273, 465 N.E.2d 256 (1984); *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984).

In each of the foregoing cases, the reviewing court determined that a retrial was barred because of the conduct of the prosecutor. In *Cavallerio*, the prosecutor deliberately commented on the defendant's failure to testify. In *Murchison* and *Broderick*, the prosecutor asked a question pertaining to the trial and conviction of a codefendant after a specific instruction from the trial judge to the prosecutor to avoid the subject. In *Pool*, the reviewing court found a violation of the State Code of Professional Responsibility[10] based upon the prosecutor's repeatedly disregarding rulings of the trial court regarding permissible questions to which a witness invoked the protection of the Fifth Amendment.

In *Pendleton*, the Illinois Court of Appeals was presented with

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[10] Bill Reimer has been privately reprimanded by the State Bar of Texas relating to his conduct in this trial regarding the intimidated witness, Carolyn Toth.

facts quite similar to the facts of the instant case and found a violation of the Double Jeopardy Clause of the Fifth Amendment based on an assistant state's attorney's misrepresentations of facts to a trial judge and jury about a conference held during a weekend recess with the complainant while the complainant was still subject to cross-examination and at a time when the complainant was unable to identify any of the defendants at trial as her assailants. When the trial commenced after the recess, the complainant positively identified each of the defendants on trial. When questioned by the court, the state's attorney attempted to conceal her meeting with the complainant and its purpose. The court held:

> We find that based upon the facts of this particular case, the assistant state's attorney's misconduct in holding the conference, coupled with her tacit attempt to conceal it and the possibility that prejudicial harm may have resulted therefrom, warrants a finding of overreaching. It would be offensive to the constitutional guarantee against successive, oppressive prosecutions, if the State, at a trial in which its case was going badly, could, by such misconduct, precipitate a mistrial and thereby gain another more favorable opportunity to convict the accused.
>
> Furthermore, the record on appeal compels the inference that the assistant state's attorney's misconduct was motivated by bad faith. It apparently resulted from a fear (based upon the testimony elicited from the complainant on Friday) the trial judge was likely to acquit a number of the defendants.

Thus, in the wake of *Oregon v. Kennedy*, an exception to the rule allowing retrials has become nearly universally accepted if there is prosecutorial overreaching and bad faith that results in action designed either to prompt a mistrial or to ensure that the trial ends in a guilty verdict. *United States v. Huang*, 960 F.2d 1128, 1133 (2d Cir. 1992);

Camden v. Circuit Court of the Second Judicial Dist., 892 F.2d 610, 614 (7th Cir. 1989); *United States v. Dennison*, 891 F.2d 255, 258 (10th Cir. 1989); *United States v. GAF Corp.*, 884 F.2d 670, 673 (2d Cir. 1989); *United States v. Torkington*, 874 F.2d 1441, 1444 (11th Cir. 1989).

The rule then is that a retrial is barred when a prosecutor engages in overreaching to the extent that the conduct constitutes an intentional attempt to deprive a defendant of his right to a fair trial or an attempt to goad a defendant into moving for a mistrial. The key factor in determining whether a prosecutor engaged in deliberate overreaching is his intent either to deprive a defendant of a fair trial or to force the defense to move for a mistrial and get a second attempt to try the defendant.

C. Extension of *Oregon v. Kennedy* To Include Some Reversals

Petitioner admits that ordinarily the protections of the Double Jeopardy Clause do not bar a retrial of a defendant following the reversal of a conviction. However, the nature and degree of the misconduct that caused the reversal of Petitioner's conviction exempts the instant case from that traditional rule. The traditional rule -- commonly referred to as the *Ball* or *Burks* rule -- contemplates that, in the context of a retrial following reversal for trial error, the interests of the defendant in being protected from repeated jeopardy are diminished and may be overcome by society's interests, alternatively described as the "interest in punishing one whose guilt is clear after he has obtained [a fair] trial," *United States v. Tateo*, 377 U.S. at 466, 84 S.Ct. at 1589, [11] or the "interest in affording the prosecutor one full and fair

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[11] The Supreme Court also states in *Tateo* that "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* The Court notes that the defendant also has an interest in retrial, because the zeal of appellate courts to guard against trial improprieties might wane if the courts perceived that "reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *Id.*

opportunity to present his evidence to the jury," *Oregon v. Kennedy*, 456 U.S. at 682, 102 S.Ct. at 2092-93 (Stevens, J., concurring). The defendant is also viewed as having waived, at least to some extent, his double jeopardy protections by seeking reversal of his sentence, voluntarily disturbing the finality of the former proceedings. *See, e.g., Lewis v. State*, 889 S.W.2d 403, 407 (Tex. App.--Austin 1994, pet. ref'd) (finding that the State may retry the defendant where the "slate" has been "wiped clean" by successful appeal "at the defendant's behest").

Neither the interest of society, the interest of the State, nor the "waiver" rationales often cited as bases for barring double jeopardy relief after appellate reversal can apply to Petitioner. In the case of most reversals for trial error, the defendant cannot subsequently claim that he lost the full value of his initial tribunal, because it remains unclear whether the initial tribunal would have acquitted him in the absence of the error, and society's interest in "insuring that the guilty are punished" remains in effect. *See Burks v. United States*, 437 U.S. 1, 15, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978). Petitioner, however, was deprived of the benefit of a verdict of acquittal by the State's intentional and knowing misconduct. The State, therefore, may not validly complain that Petitioner waived his right to trial by the first tribunal by appealing his conviction.

Petitioner asserts that the State waives society's interest in punishing the guilty and its own interest in having "one full and fair opportunity to present . . . evidence to the jury" when the prosecution commits misconduct, as it did in Petitioner's case, with the intent to prevent an acquittal that the prosecution must otherwise believe at the time is likely to occur absent the misconduct. *See e.g., United States v. Pavloyianis*, 996 F.2d 1467, 1474 (2d Cir. 1993); *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992), *cert. denied*, 508 U.S. 939, 113 S.Ct. 2414, 124 L.Ed.2d 637 (1993). When such acts occur, society's and the defendant's **mutual interest** in a **fair prosecution** must trump the State's desire to proceed with another trial after reversal based upon that same misconduct. On the basis of this concern, the

Fifth Circuit has long recognized that there should be an exception to the *Ball* rule (as modified by *Burks*), which finds no bar to reprosecution following appellate reversal on grounds other than legal sufficiency. *Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982); *United States v. Opager*, 616 F.2d 231 (5th Cir. 1980). In *Robinson*, the Fifth Circuit clearly articulated the basis for the exception:

> [T]he rationale of *Burks* [is not] inconsistent with application of the "prosecutorial overreaching" exception to bar retrial where the overreaching caused a tainted verdict to be set aside, rather than a tainted proceeding to be aborted. *Burks'* holding, resting on a perceived dichotomy between reversals for trial error and reversals for evidentiary sufficiency, indicated that, as the former hold no implication for the guilt or innocence of the defendant, they would raise no bar to further prosecution. *Burks* 98 S.Ct. at 2149. That distinction does not necessarily hold true where trial error is attributable to intentional prosecutorial overreaching. The extreme tactics which constitute prosecutorial overreaching offend the double jeopardy clause at least in part because **they unfairly deprive the defendant of possible acquittal, by heightening, in a manner condemned by law, the jury's perception of the defendant's guilt**.

Robinson, 686 F.2d at 307-08 (citing *Oregon v. Kennedy*, 456 U.S. at 689, 102 S.Ct. at 2096-97 (Stevens, J., concurring in the judgment)) (emphasis added).

The Second Circuit has best articulated a standard -- relied upon by Petitioner -- arguing that it would be unjustifiable not to extend the holding in *Oregon v. Kennedy* to include some reversals based upon prosecutorial misconduct. In *Oregon v. Kennedy*, this Court held that, in the context of an anticipated retrial after the defendant's motion for mistrial was granted, double jeopardy would prevent retrial only in

"cases in which the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for mistrial." *Id.*, 456 U.S. at 679, 102 S.Ct. at 2091. The Second Circuit extended the limited right announced in *Oregon v. Kennedy* to the appellate reversal context, finding that omission to do so would give the State free rein to undermine acquittals through deliberate misconduct undetected until after trial, an insupportable proposition:

> Indeed, if *Kennedy* is not extended [to a limited appellate reversal context] . . . a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, **but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict**. There is no justification for that distinction.

Wallach, 979 F.2d at 916 (emphasis added). The Second Circuit noted, however, that application of a double jeopardy bar to retrial of every defendant whose conviction has been reversed for prosecutorial misconduct would be too broad under the federal constitution,[12] because it "would obliterate the precise distinction drawn in *Oregon v. Kennedy* between misconduct that merely results in a mistrial and misconduct undertaken for the specific purpose of provoking a mistrial." *Id.* The Court found that the correct standard, therefore, would be:

> [Double jeopardy would bar retrial after reversal] only

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12 The Texas Court of Criminal Appeals has recognized in *Bauder v. State*, 921 S.W.2d 696 (Tex. Crim. App. 1996), that the Texas constitution provides broader double jeopardy protection than the federal constitution, including the right to a trial free not only of deliberate State misconduct, but reckless misconduct, too, that "renders trial before the jury unfair to such a degree that no judicial admonishment can cure it." *Id.* at 698. Under the Texas Constitution, as well, not every act of prosecutorial misconduct would be grounds for a double jeopardy bar following appellate reversal, but only such acts as demonstrate that "the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request." *Id.*

> where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.

Id.

Petitioner asserts that his right against twice being put in jeopardy, as guaranteed by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to Texas by the Due Process Clause of the Fourteenth Amendment, bars his pending retrial because the State of Texas engaged in intentional misconduct for the sole purpose of seeking a conviction it knew it had no other chance of securing.

A clear majority of federal appellate courts that have reviewed the issue have made findings substantially in agreement with the Fifth Circuit. *See Pavloyianis* and *Wallach, supra* (2d Cir.); *United States v. Singer*, 785 F.2d 228, 239 (8th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 273, 93 L.Ed.2d 249 (1986) (finding that the "right of a criminal defendant not to be twice placed in jeopardy should not hang on which court correctly determines that misconduct infected the trial"); *United States v. Rios*, 637 F.2d 728, 729 (10th Cir. 1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3054, 69 L.Ed.2d 422 (1981) (finding double jeopardy considerations applicable in both mistrial and reversal postures); *Evans v. Thompson*, 881 F.2d 117, 123 n.1 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990) (stating that only "deliberate prosecutorial misconduct" would bar retrial where "a verdict has been set aside for trial error"); *United States v. Curtis*, 683 F.2d 769, 774 (3d Cir.), *cert. denied*, 459 U.S. 1018, 110 S.Ct. 379, 74 L.Ed.2d 512 (1982) (finding "considerable force to the proposition" that the Double Jeopardy Clause should apply with equal weight to mistrials and reversals based upon prosecutorial misconduct); *see also United States v. Quinn*, 901 F.2d 522, 531 (6th Cir. 1990) (recognizing a possible exception to the traditional rule as expressed in *Lockhart* where there is prosecutorial misconduct); *United States v.*

Roberts, 640 F.2d 225, 231 (9th Cir.), *cert. denied*, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981) (stating that "intentional prosecutorial misconduct" may bar retrial after reversal) (Norris, J., dissenting) .

In the instant case, the Third Court of Appeals found that the prosecutor, Bill Reimer, violated Petitioner's Fourth,[13] Fifth, and Sixth Amendment rights and that he did so intentionally. Additionally, the record reveals that Reimer was on express notice that the State's forensic expert, Fred Zain, had lied and was lying about his test results. Reimer related to Petitioner's trial counsel that Zain had indicated a positive match of the hair samples only to learn later than Zain had no such results. Either Reimer lied to trial counsel or Reimer knew that Zain was lying. No other explanation exists in the record.

The record contains no indication that Reimer ever did anything to determine why Zain had lied to him. Rather, at best, Reimer acted like an ostrich and ignored the obvious implications of Zain's lies. At worst, Reimer consciously chose not to be concerned because he was more interested in a guilty verdict than in a fair trial.

In light of the record, Reimer's intentional subordination of perjury and his concealment of it from trial counsel is but more evidence of his desire either to force a mistrial or to ensure victory without regard to the constitutional cost.

As required by *Oregon v. Kennedy*, an appellate court must look at the objective facts and circumstances to determine whether there is a reasonable inference of the requisite intent on the part of the prosecutor. Petitioner strongly suggests and contends that there can be no other reasonable conclusion but that Reimer's and Zain's conduct was intentional and was calculated to deprive Petitioner of his right to

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[13] As with the other improprieties in this case, the illegal seizure of Appellant's blood with the illegal "warrant" had its genesis in a motion signed by Bill Reimer. Had it not been for Reimer's illegal actions, the illegal search would not have occurred.

a single fundamentally fair trial.

This is not a case of isolated or even repeated minor trial errors. Rather, Appellant's trial was infected at all stages by intentional constitutional deprivations of the most serious and egregious magnitude. If the prosecutorial misconduct in this case does not bar a retrial, the protections afforded by the Fifth Amendment's Double Jeopardy Clause and by *Oregon v. Kentucky* are meaningless and illusory.

This Court needs to answer the questions posed by Petitioner's case. Otherwise, it will be sending a message to all state and government prosecutors that all they have to do is not admit actual intent and their cases are immune from double jeopardy scrutiny.

If the kind of societal interest advanced by the prosecution in this case, or cases like it, is acceptable, then no one has much motivation to work and live within the system. Society's ultimate and overriding interest can only be achieved in this case by telling the State generally, and Bill Reimer in particular, that conduct such as in the instant case will not be tolerated in our system. To allow a subsequent prosecution tells that State in general, and Reimer in particular, that his conduct is ultimately acceptable because he will always get to try again.

In light of the prosecutor's egregious misconduct in this case, the double jeopardy guarantees of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, should bar any retrial. This Court should grant certiorari in this case to decide Petitioner's important questions.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral arguments, reverse the decision of the Texas Court of Criminal Appeals, and order the Texas Court of Criminal Appeals to enter a judgment granting double jeopardy relief.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

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APPENDIX A

Jack Warren DAVIS, Appellant,
v.
The STATE of Texas, Appellee,

No. 3-90-118-CR.

Court of Appeals of Texas,
Austin.

May 13, 1992.

Discretionary Review Refused
Sept. 30, 1992.

Defendant was convicted of capital murder following jury trial by the 22nd Judicial District Court, Comal County, Robert T. Pfeuffer, J. Defendant appealed. The Court of Appeals, Jones, J., held that: (1) evidence was sufficient to support conviction; (2) district attorney violated defendant's due process rights by threatening witness and knowingly using perjured testimony; (3) warrant for seizure of defendant's blood, hair, and sperm samples, was not supported by probable cause; (4) police did not act in bad faith by failing to preserve evidence; (5) gaps in chain of custody were credibility issues; and (6) admitting evidence of extraneous transaction was not error.

Reversed and remanded.

1. Criminal Law Key 1144.13(3), 1159.2(7)

Critical inquiry in legal sufficiency challenge is whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt.

2. Criminal Law Key 1159.2(7), 1159.6

In both circumstantial and direct evidence cases, evidence is reviewed to determine whether any rational trier of fact could have found essential elements of crime beyond reasonable doubt.

4. Criminal Law Key 1159.6

If evidence supports reasonable hypothesis other than guilt of defendant, finding of guilt beyond reasonable doubt is not rational.

5. Criminal Law Key 1144.13(6)

In reviewing sufficiency of evidence, appellate court considers all evidence whether properly admitted or not.

6. Criminal Law Key 553

Jury is free to reject any or all evidence presented at criminal trial.

7. Homicide Key 234(8)

Capital murder conviction supported by evidence that defendant, an apartment maintenance person who admitted being in victim's apartment on evening of murder, was in victim's apartment more than he admitted, defendant admitted to falsely claiming that blood on his clothing was pizza sauce, witness who was with defendant earlier in evening saw no sign of alleged preexisting cut on defendant's hand, and victim's blood and saliva was on defendant. V.T.C.A., Penal Code § 19.03 (a,b).

8. Criminal Law Key 655(1), 700(10)

It is not improper per se for trial court judge or prosecuting attorney to advise prospective witness of penalties for testifying falsely, but warnings concerning dangers of perjury cannot be emphasized to point where they threaten and intimidate witness into refusing to testify.

9. Constitutional Law Key 257.5
Criminal Law Key 700(1)

Threatening witness in capital murder trial with perjury charge was prosecutorial misconduct and violation of due process since conversation between district attorney and witness occurred outside context of judicial supervision, was in district attorney's office with setting conducive to intimidation, tenor of district attorney's comments was more threatening than simple warning, and effect of threat was demonstrated by witness' changed testimony. U.S.C.A. Const.Amend. 14.

10. Constitutional Law Key 268(9)
Criminal Law Key 706(2)

Knowing use of perjured testimony by prosecutor in obtaining conviction violates defendant's due process rights and denies accused fair trial. U.S.C.A. Const. Amends. 6, 14.

11. Criminal Law Key 919(1)

New trial is required where prosecutors knowingly used perjured testimony if false testimony could, in any reasonable likelihood, have affected judgment of jury.

12. Constitutional Law Key 268(9)
Criminal Law Key 706(2)

District attorney denied capital murder defendant fair trial and violated defendant's due process rights by creating false impression that witness voluntarily returned to prosecutor's office on witness' own initiative to recant testimony, despite the fact that district attorney initiated contact with witness and implicitly threatened to prosecute witness for perjury if witness did not change testimony. V.T.C.A., Penal Code § 19.03(a, b); U.S.C.A. Const. Amends. 6, 14.

13. Searches and Seizures Key 14

Taking blood from criminal suspect is search and seizure under federal and state law. U.S.C.A. Const.Amend. 4; Vernon's Ann.Texas C.C.P. art. 18.02(10).

14. Searches and Seizures Key 78

Absent consent, taking blood sample from defendant in custody requires validly obtained warrant. U.S.C.A. Const.Amend. 4.

15. Searches and Seizures Key 102

Warrant may be issued to search for and seize property or items that are evidence of offense or which tend to show that particular person committed offense. Vernon's' Ann.Texas C.C.P. art. 18.02(10).

16. Searches and Seizures Key 113

To justify issuance of search warrant for evidence of offense, there must be supporting affidavit setting out sufficient facts to establish probable cause that specific offense has been committed, that specifically described property or items are to be searched for or seized constitute either evidence of that offense or evidence that particular person committed that offense, and that property or items constituting evidence to be searched for are seized are located at or on particular person, place, or thing to be searched. Vernon's Ann.Texas C.C.P. arts. 18.01(c), 18.02(10).

17. Searches and Seizures Key 114

Allegations that defendant was suspect in capital murder investigation did not establish probable cause needed for issuance of search warrant to obtain blood, hair, and sperm samples from defendant. U.S.C.A. Const.Amend. 4; Vernon's Ann.Texas C.C.P. arts. 18.01(c), 18.02(10).

18. Criminal Law Key 394.4(5)

Texas statutory exclusionary rule creates exception to general rule for evidence obtained by law enforcement officer acting in objective, good-faith reliance on warrant issued by neutral magistrate based on probable cause. Vernon's Ann.Texas C.C.P. arts. 38.23, 38.23(b).

19. Criminal Law Key 1036.1(4)

Objection to allegedly illegally seized evidence is unnecessary to preserve claim of error where pretrial motion to suppress is heard and overruled. Rules App.Proc., Rule 52(b).

20. Criminal Law Key 1044.2(1)

Defendant's objection to blood seized pursuant to affidavit issued without probable cause was preserved for appellate review, despite the fact that no objection was made at trial, since defense counsel objected to admission of blood sample on ground that search warrant was not valid, objected to expert testimony regarding the blood, and defendant's pretrial motion to suppress was heard and overruled. Rules App. Proc., Rule 52(b); Vernon's Ann.Texas C.C.P. arts. 18.01(c), 18.02(10); U.S.C.A. Const.Amend. 4.

21. Criminal Law Key 1045

Party must complain only until receiving adverse ruling to preserve error; only if objection is sustained must party making objection then request instruction, or if instruction is given, party must request mistrial.

22. Constitutional Law Key 268(5)

Three factors relevant in determining whether failure to preserve evidence has resulted in violation of due process are: likelihood that lost evidence was exculpatory; likelihood that defendant was significantly prejudiced at trial by absence of evidence; and level of government culpability. U.S.C.A. Const.Amends. 5, 14.

23. Constitutional Law Key 268(5)

Failure to preserve potentially useful evidence, absent showing of bad faith on part of police, does not, in and of itself, result in denial of due process of law since accused must show that police conduct itself indicates that evidence could form basis for exonerating defendant. U.S.C.A. Const.Amends. 5, 14.

24. Constitutional Law Key 268(5)
Criminal Law Key 700(9)

Loss of evidence from capital murder investigation did not deny defendant due process in absence of evidence that police or their agents acted in bad faith regarding failure to preserve evidence. U.S.C.A. Const.Amends. 5, 14.

25. Witnesses Key 372(2)

Refusing to permit capital murder defendant to cross-examine victim's sister about wrongful death suit filed against owners of apartment complex where murder occurred to impeach witness to show bias or prejudice was error since state was permitted to question apartment complex manager about suit. V.T.C.A., Penal Code § 19.03(a, b).

26. Criminal Law Key 404.30

Proof of chain of custody is generally vital to admissibility of evidence if its relevant characteristics are distinguishable only by scientific tests or analyses.

27. Criminal Law Key 404.30

Any gaps in chain of custody of evidence usually goes to weight, and not admissibility, if state proves beginning and end of chain.

28. Criminal Law Key 404.45

State's alleged failure to adequately explain end of chain of custody of defendant's blood samples was credibility issue, and did not go to admissibility of evidence, since police officer's testimony that samples were received from expert and were then destroyed established end of chain.

29. Criminal Law Key 369.2(1)

Extraneous offenses are admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; admissibility is affected by whether its probative value is substantially outweighed by danger of unfair prejudice. Rules of Crim. Evid., Rules 403, 404(b).

30. Criminal Law Key 369.2(4)

Evidence of extraneous transaction, that capital murder defendant was seen entering victim's apartment without knocking or turning on lights, was probative since maintenance logs of apartment complex did not agree with defendant's statement about times he had been in apartment to do maintenance. Rules of Crim.Evid., Rules 403, 404(b); V.T.C.A., Penal Code § 19.03(a, b).

John J. Curtis, New Braunfels, for appellant.

Bill M. Peimer, Dist. Atty., Comal County and Robert H. Fisher, Asst. Dist. Atty., New Braunfels, for appellee.

Before JONES, KIDD and B.A. SMITH, JJ.

JONES, Justice

A jury convicted Jack Warren Davis, appellant, of capital murder. Tex.Penal Code Ann. § 19.03(a), (b) (1989). After the jury was unable to

answer the first special issue on punishment (deliberateness), the court sentenced him to life imprisonment pursuant to 1985 Tex.Gen.Laws, ch. 44, § 2, at 434 (Tex.Code Crim.Proc. art. 37.071, since amended). Davis appeals, bringing sixteen points of error. We will reverse the judgment of conviction and remand the cause for a new trial.

On November 17, 1989, at approximately 10:15 p.m., appellant, a maintenance worker at the New Braunfels Oaks Apartments, reported to Carolyn Toth, the manager of the apartment complex, that he had found the body of Kathie Balonis in her apartment. The police were called. At some point after their arrival, the on-scene investigators became suspicious of appellant when they observed blood on his clothing and a cut on his left hand. Detective Felix Roque, New Braunfels Police Department, questioned appellant at the department. After this interview, the police took him to his apartment, allowed him to change clothes, and then seized the clothes he had been wearing. They returned him to the police department and fingerprinted him. The district attorney's office then requested that he be booked for the offense of murder.

SUFFICIENCY OF THE EVIDENCE

Appellant contends, in point of error one, that the evidence is legally insufficient to support his conviction. The evidence in the case consisted of various accounts of the evening's events, forensic evidence such as the analysis of blood found at the scene, and expert testimony on the type of crime and possible characteristics of the offender (e.g., that it was possible for a person who had not displayed violent tendencies to, in essence, "explode").

Discovery of the Body/Description of the Crime Scene

The apartment building in which Kathie Balonis lived, one of several buildings in the complex, is a two-story structure with three sets of stairs: east and west at either end of the building, as well as a middle staircase. Kathie's apartment was the westernmost apartment on the second floor. Marci French, another resident in the complex, lived in the apartment east of, and adjacent to, Kathie Balonis. Appellant lived on the ground floor in the apartment second from the east end of the building. On the day of the

murder, he was wearing jeans, a tan maintenance uniform shirt, and a blue insulated-type vest. Appellant was described as having a medium heavy build, with medium-length brown hair and sideburns.

Appellant testified that on the night of the murder, at about 10:00 p.m., he went onto the porch outside his apartment to smoke a cigarette. He heard a sound, like somebody saying, "Hey." He looked toward the west end of the building, in the direction of Kathie Balonis's apartment, but saw nothing. A minute or two later, he saw a man coming hurriedly, but not running, down the stairs. Appellant followed the man to the parking lot and saw him get into a small car (a Chevrolet Vega, he thought) and drive away rapidly.

Appellant stated he returned to the building and went up the west stairs. He saw people in Marci French's apartment, and everything looked all right. He went to Kathie's apartment, knocked three times, got out his passkey, but tried the knob and found the door unlocked. He entered and announced "maintenance" several times, but got no response. He saw the bed in front of the doorway, saw Kathie's body on the floor, kneeled beside her, put his arms underneath her shoulders, shook her, and shouted her name. He got no response, put her back down, and went to the apartment of Carolyn Toth, the apartment-complex manager, for help.

Carolyn Toth testified that appellant knocked at her door at about 10:15 p.m., telling her. "The girl in 202, it's horrible, it's horrible, she might be dead, you've got to come, it's horrible." Appellant was wearing blue jeans, a tan maintenance uniform shirt, a baseball hat, and a blue vest. She noticed what appeared to be blood on his clothing. He later said it was pizza sauce.

Toth said that appellant told her he had been watching television with his stepson, went out on the porch, heard a noise like a "herd of elephants" coming down the west staircase, and saw a man with shoulder-length dark hair wearing a white shirt. Appellant had said he followed the man as the man ran to the parking lot and left in a Vega. Toth told her mother to call the police, and the two of them and appellant went outside, where they encountered Karen Balonis, Kathie's sister, who also lived in the complex.

Karen Balonis had been doing laundry on the night of the murder. She left her apartment to attend to the laundry sometime after 10:00 (after the news had started, but before the weather came on). She saw Carolyn Toth, Toth's mother, and appellant standing at the entrance to the laundry room looking up. Toth told her that Kathie had been stabbed.

Karen ran to Kathie's apartment. She looked around the living room, then headed for the bedroom. The bed was blocking the entrance to the bedroom, so she had to climb over it. She saw he sister on the floor with the top of her head under the bed. As she pulled Kathie out from under the bed she did not see a lot of blood on her. She did, however, notice blood on the pillow case. She found no pulse, but started CPR anyway. At that point Marci French, a neighbor, and French's guest Shelly Flynn entered the apartment.

French saw Karen Balonis as she ran up the stairway. French said Karen paused, looked in her window, and ran over to Kathie's apartment. French then heard Karen scream that Kathie had been stabbed. She and Flynn ran to Kathie's bedroom. The bed was in front of the bedroom door and appeared to be in disarray. French told Flynn to call the police, then returned to her apartment to call the police herself because Flynn, her visitor, did not know the address of the apartment complex. When French saw that police were already arriving, she returned to Kathie's apartment. She did not notice the apartment being in disarray, other than the bed being in the wrong place. She moved an ironing board and a chair so that EMS personnel could get through the apartment more easily, and she put a sheet over Kathie's body.

As Karen was performing CPR on Kathie she told Flynn to apply pressure to an abdominal wound so that the CPR would not force more blood out of the wound. Karen said that at no time did she get more than a spot of blood on her pants leg—no blood was on her hands, mouth, or any other part of her body.

Officer Scott Lange, New Braunfels Police Department, responded to the call reporting a stabbing. When he arrived, he heard a scream. As he entered Kathie's apartment and went back to the bedroom, he noticed the

bed blocking the doorway from the living room to the bedroom. He saw Karen Balonis and Shelly Flynn in the bedroom and saw the body of Kathie Balonis on the floor. He went back outside to use his radio to call for EMS because the radio would not work inside the apartment. At that point, Officer Keating arrived and went into the apartment.

Lange remained about half-way up the stairway by the apartment. Appellant, who Lange knew was the maintenance worker at the apartments, approached Lange and expressed concern about Balonis' condition. Lange said that in his opinion appellant was intoxicated, although not to the point of incoherence. Appellant told Lange that he had seen the person who did it, describing a white male with black hair. He said the man ran down the stairs, rant beside the pool, ran between two other buildings and into the parking lot where he left in a Vega. Other than the one time he talked to him, Lange did not see appellant come up the stairs or stand on the upstairs balcony.

Shortly after 10:00 p.m., Officer Keating, New Braunfels Police Department, responded to the call about a stabbing. He entered Kathie's apartment and went to the bedroom. He could see that the bed was partially blocking the doorway. Three people were in the room. He went in and began CPR. He then removed Karen because she was "emotionally out of control" and went back into the apartment. He moved the bed so EMS technicians could get in.

Karen Balonis said that after EMS personnel arrived, she was asked to leave the apartment. She went outside on the balcony. She said appellant came up the center stairs to the balcony, hugged her, and kept telling her he was sorry. She said, contrary to appellant's version of events, that she did not return his hug, did not touch him, and could not have gotten any of Kathie's blood or saliva on him from her hands even if any had been on her hands, which she denied. Carolyn Toth, on the other hand, testified that she saw appellant go up the west stairs by the victim's apartment, and that when appellant embraced Karen Balonis, Karen returned the embrace. This dispute as to the nature of the embrace is important in the following respect: Forensic evidence placed Kathie Balonis' blood and saliva on the back shoulder of appellant's vest, which was not consistent with his account of

what happened when he discovered the body. Appellant's exculpatory explanation was that the blood and saliva must have been on Karen Balonis' hands and was transferred to his clothing during their embrace on the balcony.

Officer Kama, an investigator for the New Braunfels police department, asked appellant what he had seen, and appellant told him. The officer shined a light on appellant's legs and asked what "that" (the bloodstain) was. Appellant told him at the time that it was pizza sauce, stating at trial that he "didn't, at that time, care for what he was insinuating." Later that evening, appellant was arrested. During subsequent questioning, appellant never told Detective Roque, an investigator with the New Braunfels Police Department, that the stain was anything other than appellant's own blood.

The State presented forensic evidence linking appellant to the scene. Fred Zain, the State's expert witness who performed the blood and DNA testing, testified to the presence of Kathie's blood and saliva on the right rear shoulder of appellant's vest and to the presence of her blood on appellant's pants leg. Zain also testified that appellant's blood was found on Kathie's pillow, on the carpet next to her body, on carpet away from the body, and on the neck of her blouse and sweater. Appellant's blood was also found on the outside doorknob of his apartment.

Appellant's Account of Earlier Events

Appellant testified that he finished work between 3:30 and 4:00 p.m. on the day of the murder. He picked up his check around 4:00, went to his apartment, and attempted to open a large package that had arrived earlier that day. While using kitchen knife to do so, he cut his hand on the palm, then pressed his hand against his pants leg in the left front pocket area in order to stop the bleeding. He then helped Raymond Powell, his stepson, move some equipment from one apartment to another. Appellant then went to Landa Station, a restaurant, where he worked in the office. He left Landa Station around 6:30 p.m. and went to the Kings & Queens Bar to play darts. He said he falsely told the police in his statement taken on the day of the murder, November 17, that he got home at 6:30 because he felt bad about being at the bar playing darts while his wife was in the hospital. After

he left the bar, he returned to Landa Station for a few minutes, then went home.

Pamela Sue Foulds, a friend of appellant and his wife, testified that she was at the Kings and Queens Bar on November 17, between 6:30 and 9:15 p.m. She saw appellant there and played darts with him. She did not see a cut on his hands or notice him bleeding. The fact that Foulds did not notice a cut is important because re-opening a previous wound is appellant's explanation for the presence of his own blood at the murder scene.

Appellant said he arrived home about 9:15 p.m Raymond Powell and his wife Hazel Marie were in appellant's apartment watching television. While appellant ate dinner, he talked to them until around 10:00 p.m. or a little later, when they left.

Hazel Marie Powell is appellant's daughter-in-law. She testified that about 5:30 or 6:00 p.m., her husband Raymond returned home from work. She fixed him something to eat, and they went back to the New Braunfels Oaks Apartments to turn on the heat in an apartment that was to be painted the next day. The door to appellant's apartment was unlocked, so they went in a little after 8:00 p.m., turned on the television, and started watching a movie. Appellant returned a little after 9:00. He talked to them while he ate. Hazel Marie said that before they left, the movie had ended and she saw a clock that showed it to be almost 10:30 p.m. Her time estimate is inconsistent with other witnesses' accounts of the time when the body was discovered.

Rick Barr, a resident of the New Braunfels Oaks Apartments, said that on November 17, sometime between 4:00 p.m. and 5:00 p.m., he noticed a man with long dark stringy hair walking across the lawn to the stairs to Kathie Balonis' apartment. He did not see the man leave. Although the description is similar to appellant's description of the man he saw leaving later that night, Barr did not see the man enter Kathie Balonis' apartment and the time that Barr saw the man is much earlier than the murder.

Jessica Ornelas, who lived in the apartment below Kathie Balonis', said that at around 4:30 p.m. on the day of the murder she heard what

sounded to her like the noise of water running in the bathroom coming from Kathie's apartment. Although this might tend to support the idea that someone else had access to the apartment, the time is again significantly earlier than the murder.

Neighbors' Accounts of the Events

Carolyn Toth, the apartment complex manager, testified that she arrived at the apartment complex about 7:30 p.m. Around 9:15 p.m., she saw appellant arrive. At 9:45, she left with her mother to pick up her father. She saw a burnt-orange car leaving the parking lot, but did not see appellant in the parking lot. Toth and her parents returned about 10:05 and did not see a dark-haired man or appellant, nor did they see any vehicle leaving the parking lot. Maintenance records were introduced through Toth that showed no calls to Kathie Balonis' apartment in the several days before the murder.

Officer Keating, a patrolman with the New Braunfels Police Department, was a resident of the apartment complex and worked as a courtesy patrol for it. At about 9:55 p.m. on the night of the murder, he was at the complex. He testified that he did not see a Vega in the parking lot at the time and did not see appellant chasing anyone.

Marci French described the walls between the apartments as being thin enough to hear people talking or laughing in the adjacent apartment. The doors of the apartments were close enough together so that one could hear knocking at adjacent doors. When the stairway outside her apartment is used, it causes her apartment to vibrate. During the evening, she never heard a scream, anyone running down the stairs, a knock on the door of the adjacent apartment, or an announcement of "maintenance," all directly contrary to appellant's account of events.

On the day of the murder, French was entertaining guests. She and her guests had been out shopping and returned to her apartment sometime between 8:45 and 9:00 p.m. Around 9:30 she heard some kind of "rumbling" noise that she first thought was coming from the stairs, but then thought was coming from Kathie's apartment.

One of the guests Kenneth Stainbrook, said he was sitting next to a large window. At about 9:30 p.m, he saw a white male of medium build, wearing a tan cap and an insulated blue vest, out on the balcony. Fifteen to twenty minutes later, he saw the same person walking to the east on the balcony. Stainbrook never heard a knock on Balonis' door or an announcement of "maintenance."

Shelly Flynn, another of French's guests, saw a man walking by French's apartment in a west to east direction at about 9:20. Because her view was partially blocked, all Flynn could really see was the arm of his shirt. She was unsure whether the sleeve was a white underwear-type shirt or a tan shirt. She saw a man walk by again about 10:05. A few minutes later, she saw a man she identified a appellant walk by. She could not identify appellant as the man she had seen between 9:00 and 10:00 p.m. She never heard a knock on Kathie Balonis' door or an announcement of "maintenance." She said she later heard appellant make a comment about how he got Kathie Balonis' blood on himself.

After Kenneth Stainbrook and his wife left, shortly after 10:00 p.m. French saw a man crossing from east to west on the balcony. He was wearing a light-colored shirt and a sleeveless vest, and had brown hair with scruffy sideburns. She was alarmed because of the hour and because that portion of the balcony was seldom used as a travelway due to a large number of hanging plants in front of one of the apartments. She opened her door, but the man had already disappeared. Kathie Balonis' apartment door was closed.

After French reentered her apartment, she heard someone go down the stairs. She and Flynn went outside and looked down from the balcony, but did not see anyone. Shortly thereafter, French heard someone coming up the steps. She looked out her door, but saw no one. Kathie Balonis' door was shut. As French was on her way out her door to see what was going on at Kathie Balonis' apartment, she saw appellant coming out of Kathie's apartment. She said he stopped at the top of the stairs and "just pondered for a moment," then walked down the stairs. She said appellant was dressed the same way as the man she had seen earlier: a puffy blue vest, light-colored shirt, dark parts, and a cap.

Karen Balonis testified that she saw Kathie on the night of the murder, about 8:40 p.m., while Karen was doing laundry. They talked until they went back to their respective apartments around 9:00 p.m. About 9:30, Karen went back to the laundry room to check on her laundry. As she was on her way back to her apartment, she thought she heard Kathie's door, which made a unique sound, open or close. She looked, but saw no one outside Kathie's door. Karen returned to her apartment and called Kathie about 9:40 p.m., but got no answer. Shortly after 10:00, as she returned to the laundry room, she encountered appellant and the Toths, who told her that Kathie had been stabbed.

Rationality of Conviction

[1-5] The critical inquiry in a legal-sufficiency challenge is not whether this Court believes the evidence at trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Griffin v State*, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981). In both circumstantial and direct-evidence cases, we review the evidence to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Carlsen v. State*, 654 S.W.2d 444 (Tex.Crim. App. 1983).[1] The evidence must exclude every other reasonable hypothesis except the defendant's guilt, even if the evidence leads to a strong suspicion or probability that the defendant committed the offense. *Skelton v. State*, 795 S.W.2d 162, 167 (Tex.Crim.App.1989). If the evidence supports a reasonable hypothesis other than the guilt of the defendant, a finding of guilt beyond reasonable doubt is not rational. *Denby v. State*, 654 S.W.2d 457, 464 (Tex.Crim.App.1983) (opinion on rehearing). In reviewing the sufficiency of the evidence, we consider all of the evidence, whether properly admitted or not. *Dunn v. State*, 721 S.W.2d 325 (Tex.Crim.App.1986).

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1. *Geesa v. State*, 820 S.W.2d 154 (Tex.Crim.App. 1991), overruling *Carlsen* and its progeny, does not apply to this appeal. *Geesa* specifically stated that *Carlsen* would continue to apply to all cased pending on appeal at the time *Geesa* was handed down, November 6, 1991.

[6] The jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be accorded their testimony. *Esquivel v. State*, 506 S.W.2d 613, 615 (Tex.Crim.App.1974). The jury is free to reject any or all of the evidence presented at trial. *Russeau v. State*, 785 S.W.2d 387, 391 (Tex.Crim.App.1990).

[7] We conclude that it was not irrational for the jury to convict appellant based on the evidence presented to them at trial. The jury heard accounts of the evening's events that placed appellant in Kathie Balonis' apartment more than the one time he claimed. There were maintenance records that showed not calls to her apartment. The jury also heard descriptions of her body's position at the scene that differed from appellant's version. Appellant admitted that he had initially lied about the time of his return home. He admitted that he had falsely claimed that blood on this jeans was pizza sauce. The witness with whom appellant played darts that evening said that she saw no sign of blood or a cut on his hand at a time when he said he had already cut his hand on a package. Appellant claimed to hear noise and see a person leaving in a Vega at the time of the murder, but other people in the vicinity did not.

The forensic evidence presented to the jury placed the victim's blood and saliva on appellant, as well as identifying appellant's blood in the victim's apartment, in locations not consistent with his version of events. Appellant challenges the credibility of Zain's testimony. During the trial, Zain stated that appellant's blood was on the collar of the victim's shirt, a fact that was not revealed in any of his previous written reports. Zain characterized this omission as an "oversight." We do not reweigh the credibility of the witnesses, and whether this mistake as to one sample should affect the rest of Zain's testimony was a matter for the jury.[2]

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2. Appellants' brief refers to another problem raised in a deposition given by Zain in a civil action and contained in his out-of-time motion for new trial: the blood on some carpet samples was not appellant's, but the victim's blood. That evidence is not before us for review, because it was not part of this trial.

There was testimony that a man was seen at the apartment complex who fit the description of the man appellant said he saw leaving Kathie Balonis' apartment. In addition, noises were heard in the apartment at a time when Kathie Balonis was not home. However, this testimony, other than appellant's, referred to a time much earlier in the afternoon. In any event, the jury was entitled to believe the State's witnesses' accounts of the events of that day. Because a rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt, we overrule appellant's point of error one; appellant is not entitled to an acquittal.

PROSECUTORIAL MISCONDUCT

Background

In point of error nine, appellant contends that the trial court erred in overruling his motions for mistrial and for instructed verdict based on prosecutorial misconduct; specifically, appellant complains that the district attorney intimidated a witness and used her perjured testimony. We will sustain this point of error.

The witness in question is Carolyn Toth, the manager of the New Braunfels Oaks Apartments. the testimony in question involved Toth's description of a consolatory embrace between appellant and the victim's sister, Karen Balonis, shortly after the murder was discovered. The significance of the testimony, from appellant's perspective, is that it could explain forensic evidence showing the presence of the victim's blood and saliva in a location on appellant's vest inconsistent with his account of this contact with the victim's body.

Toth testified, on direct examination by the State, concerning the events on the night of the murder and the physical layout of the apartment complex. The building had three sets of stairs: east and west at either end of the building, as well as a middle staircase. Kathie Balonis' apartment was the westernmost apartment on the second floor. On cross-examination, Toth testified that after the discovery of the body and the arrival of police officers, she saw appellant go up the west stairs by the victim's apartment and embrace the victim's sister, Karen, who returned the embrace.

On redirect examination, the district attorney pointed out that two police officers were on the west stairway restricting access to the area of the victim's apartment at the stairway. He asked if appellant might have gone up the middle stairway, and if Toth might have seen him after he arrived at the second floor balcony. Toth replied that when she saw him, he was walking up the stairs by the victim's apartment. The district attorney then asked her if she saw Karen Balonis actually embrace appellant or if she just saw them get close together as if an embrace were going to occur. Toth answered that she saw hands on shoulders in an embrace.

The next day, the State recalled Toth. She was questioned by the district attorney as follows:

Q: Mrs. Toth, after testifying, this morning did you–after testifying, did you contact me, Mrs. Toth, and inform me that you felt that perhaps you had left the wrong impression on some of your testimony?
A: Correct.
Q: You testified yesterday that you saw the defendant go up the stairs to Kathie Balonis' apartment. Did you actually see him go all the way to the top of the stairs or did you just see him start up the stairs?
A: Start.
Q: You never saw him actually come to the top of the stairs?
A: No.

* * * * * * *

Q: You also testified yesterday to what, in your mind, you initially thought was an embrace between Karen Balonis and the defendant, Jack Warren Davis; is that correct?
A: Yes, sir.
Q: Now, along that upper balcony, is there a large wooden handrail that goes across there?
A: Correct.
Q: Would that have obstructed your view?
A: Very Possibly
Q: Did you see a concluded embrace, to where the hands of Karen Balonis actually touched the shoulders of Jack Davis, or did you see Jack Davis to around (indicating) and the hands just start up by Karen Balonis?

A: What you said the first time.
Q: You did not see a concluded embrace? But just off of your present-sense impression you just had assumed that it was concluded?
A: When I saw his arms go up around her, I just assumed when I saw her arms they were consoling one another and the arms came up.
Q: In other words, you found there may be a difference between an initial act and a concluded act; is that correct?
A: That's correct.

The State then padded the witness. Defense counsel asked her to explain, in her own words, what differed between her prior testimony and her current testimony. She replied:

> That yesterday in my statement, I had thought, when you had asked me the question, I said I thought there was an embrace, they had "consoled each other," is a good choice of words; and when I went home last night and thought about it, thought about the arms coming up, and I saw Jack's arms going around Karen, I saw other arms come up, and it made me think last night maybe it could have been anybody's arms coming up, but it wasn't an embrace where Karen put her arms completely around Jack.

She then said that she did not see Karen's arms go around appellant; and in response to a question whether she saw Karen's arms *start* to go around appellant, she made a gesture which was recorded in the statement of facts as Karen's arms going up to her side. The questioning then moved on to whether anyone had asked her to change her testimony or had threatened her if she did not do so. She said that no one had done so.

Hearing on Motion for Mistrial

Upon learning that, in between Toth's two rounds of direct testimony, the district attorney had threatened Toth with a grand jury indictment for perjury if her original testimony about the staircase and the embrace were found to be false, appellant moved for a mistrial on the ground of prosecutorial misconduct. The trial court heard testimony at an informal

hearing outside the jury's presence. At this hearing, the district attorney informed the court that after Toth first testified, he reviewed the statements from the various police officers, particularly from the two who said that they had secured the west stairway by the victim's apartment and that appellant had only come halfway up the stairs. He also reviewed Karen Balonis' testimony that she did not embrace the defendant. He then asked an officer to contact Toth and have her call his office. When she arrived at his office, he told her that there was a conflict between her testimony and that of other witnesses; that if he could not resolve this conflict he would present the matter to the grand jury; and that if the officers had lied he would indict the officers, or "the reverse if she had not told the truth." He also told her that he had "already put one person in jail for lying on the stand last year." He said he then asked her if she might have been mistaken about having seen a completed embrace. She said she had been mistaken.

The trial court then recalled Toth, still outside the presence of the jury, told her that she now had judicial immunity from prosecution for perjury, and assured her that she was not going to jail. The court asked her if she had changed her testimony in response to the district attorney's threat to have her brought before the grand jury. She answered, under oath, "That's why I changed it." She said that the district attorney's manner frightened her; that she felt intimidated by his saying that he had already put one person in jail for lying; that she was afraid he would put her in jail; and that she was now distraught about the matter and had been suffering physically.

After the court finished its questioning of Toth, the district attorney questioned her. During this questioning, Toth became upset, telling the district attorney that he was not allowing her to properly answer the questions and that he had "put me and my life through hell and back, and you can't do this to me." She said that she had been intimidated by his attitude and manner, by his having come unexpectedly onto the apartment complex property one day, and by a police officer who had tried to get her to "ride out in the country" one day to talk about the case. The district attorney also questioned Toth about a lawsuit filed by the victim's estate against the apartment complex, to which she responded that the lawsuit was not her concern because she had not been sued personally.

Defense counsel then questioned Toth. She said the district attorney's office had called her after she first testified and asked her to come in for a talk. She said the only person she called after that was her attorney. She said that after their meeting the district attorney told her on three different occasions that he was going to say in front of the jury that *she* called *him.*

Defense counsel then called Doris R. Simms, Toth's mother, still outside the presence of the jury. Simms said that as she was sitting in the hallway while Toth was waiting to testify for the second time, the district attorney came up to Toth, patted her hand, and told her that he was going to tell the jury that she had called him and said that she had thought about the matter and wanted to change her story. The district attorney said he was attempting to show that the filing of the civil lawsuit against the apartment complex had caused a change in attitude in several witnesses. The district attorney then asked Simms if she was aware of a "quasi feud" between the Balonis sisters and Toth over another tenant. Simms said her daughter had no hard feelings about the matter of this tenant, who eventually was asked to leave.

The district attorney then called Nancy Filkins, an employee in his office, to testify at the hearing. Filkins had been present when Toth came to the office to give her statement of May 1. Filkins said the district attorney had requested Officer Alvarez to ask Toth to come to the office. Filkins said she told the district attorney that Toth had called back, although she herself did not take the call. She was told that Toth would be there in thirty minutes. She said that the district attorney's only knowledge of the phone call was through her, and that she did not see him berate, intimidate, or in any other manner try to coerce Toth during their meeting. Filkins was in the room the entire time. She said the district attorney told Toth that there was a discrepancy between an officer's testimony and hers; that he would go after the officer if he made a misstatement on the stand as well; that Toth did not appear to be extremely upset; that she remained in his office for about an hour and a half and did not express any displeasure about the way in which the contact had been handled; and that he turned on the tape immediately when she came into his office.

Defense counsel then called the district attorney, who said he had not attempted to intimidate Toth; that it was his understanding that Toth had called his office; that he was simply trying to find out if someone was lying or if there was simply a perception problem caused by a tendency to see part of an act and assume its completion; and that he had informed Toth that if anyone involved were lying he would take them to the grand jury. Counsel then asked whether the officers had testified in depositions that appellant was not on the balcony, while Karen Balonis, as well as Toth, had said that he was.

After this hearing, the trial court ruled that there had not been prosecutorial misconduct that would justify a mistrial. The judge said he was going to instruct the jurors that they were not to consider Toth's second round of testimony for any purpose, which he later did. He said the district attorney would be called to a separate hearing to see whether he should have to face sanctions.

Analysis

[8] Under certain circumstances, a judge's or prosecutor's threats or intimidation that dissuade a witness from testifying or persuade a witness to change their testimony may infringe a defendant's due-process rights. *See Webb v. Texas,* 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972). "It is not improper *per se* for a trial court judge or prosecuting attorney to advise prospective witnesses of the penalties for testifying falsely." *United States v. Blackwell,* 694 F.2d 1325, 1334 (D.C.Cir. 1982); *accord United States v. Hooks,* 848 F.2d 785, 799 (7th Cir.1988); *United States v. Whittington,* 783 F.2d 1210, 1219 (5th Cir.), *cert. denied,* 479 U.S. 882, 107 S.Ct. 269, 93 L.Ed.2d 246 (1986); *United States v. Simmons,* 670 F.2d 365, 371 (D.C.Cir. 1982), *cert denied,* 464 U.S. 835, 104 S.Ct. 121, 78 L.Ed.2d 119 (1983). "But warnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify." *Blackwell,* 694 F.2d at 1334; *accord Hooks,* 848 F.2d at 799; *United States v. Hammond,* 598 F.2d 1008, 1012-13 (5th Cir.1979); *United States v. Morrison,* 535 F.2d 223, 227-28 (3rd Cir. 1976).

Although there is no bright line of demarcation between proper and improper perjury warnings, we agree with the following comments in a recent opinion by the North Carolina Supreme Court:

> Whether judicial or prosecutorial admonitions to defense or prosecution witnesses violate a defendant's right to due process rests ultimately on the facts in each case. Such admonitions should be administered, if at all, judiciously and cautiously. This is particularly true with regard to prosecutorial conduct because, as here, it generally occurs outside the context of the trail itself, is not a part of the official court proceedings, and is not subject to judicial supervision and control. Witnesses should not be discouraged from testifying freely nor intimidated into altering their testimony.....
>
> In all these kinds of cases the reviewing court should examine the circumstances under which a perjury or other similar admonition was made to a witness, the tenor of the warning given, and its likely effect on the witness's intended testimony. If the admonition likely precluded a witness "from making a free and voluntary choice whether or not to testify," *Webb*, 409 U.S. at 98, 93 S.Ct. at 353, 34 L.Ed.2d at 333, or changed the witness's testimony to coincide with the judge's or prosecutor's view of the facts,..... then a defendant's right to due process may have been violated. On the other hand, a warning to a witness made judiciously under circumstances that reasonably indicate a need for it and which has the effect of merely preventing testimony that otherwise would likely have been perjured does not violate a defendant's right to due process.

State v. Melvin, 326 N.C. 173, 388 S.E.2d 72, 79-80 (1990).

[9] In the present case, the actions of the district attorney went far beyond a cautious and judicious warning. First, the conversation between the district attorney and Toth occurred outside the context of the trial court and the protection of judicial supervision. Second, it was a personal interview in the district attorney's office, a setting clearly conducive to intimidation. Third, the tenor of the district attorney's comments were more threatening than a simple warning would need to be; for example, the district attorney's remark that he had "already put one person in jail last year for lying" seems designed to intimidate Toth. Finally, the dramatic effect of

the meeting on Toth was clearly established, both in the very fact that she changed her testimony and in the reasons she gave for the change.

In response, the State dwells at length on the prosecution's general duty to correct false testimony, attaching to its brief the text of an article on the problem of the "recanting witness."[3] Toth, however, was not a recanting witness in the sense that the State urges. Nowhere in the record of the hearing concerning the district attorney's actions is there any evidence that she voluntarily changed her story before the district attorney told her she faced a possible perjury indictment.

Moreover, although the district attorney referred to his perception of a "change in attitude" on the part of several witnesses after the filing of a lawsuit against the apartment complex (and also attempted to show bad feelings between Toth and the Balonis sisters), his concern with Toth's testimony was simply that it conflicted with statements from other witnesses. It is not unusual for conflicts to exist between eyewitnesses' accounts of events. The claimed discrepancies here seem to be that type of conflict: did the defendant go all the way up the west stairway or did he use the middle stairway or was he on the second-floor balcony at all? Did he embrace Karen Balonis, did she embrace him back, and, if so, to what degree? The district attorney had the opportunity on recross to elicit the fact that Toth saw appellant start up the stairs, but perhaps did not watch him continuously from the bottom to the top of the stairway. The desired clarification of Toth's testimony could have been handled in the ordinary course of examination and argument. *See Pierce v. State*, 777 S.W.2d 399, 415-16 (Tex.Crim.App.1989), *cert. denied*, 496 U.S. 912, 110 S.Ct. 2603, 110 L.Ed.2d 283 (1990) (court properly exercised discretion in excluding expert testimony on eyewitness reliability; jury is qualified to make credibility determination about eyewitnesses, aided by cross-examination and common knowledge of memory and its effect on perception); Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R.4th 1047 (1986) (collecting cases

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3. The material attached was apparently presented at a seminar. It is now published as G. Sarno & J. Douglass, *Recantation: Problems for Prosecutors Before, During and After Trial*, 18 Am.J.Crim.L. 187 (1991)

dealing with admissibility of expert testimony on the reliability of eyewitness perceptions and identifications). A private meeting with Toth outside the presence of the trial judge, in which the district attorney boasted of having already sent one person to jail for perjury, was unnecessary and was calculated to intimidate Toth into changing her testimony. We hold that the district attorney's actions were improper.

[10-12] Furthermore, the knowing use of perjured testimony by a prosecutor in obtaining a conviction violates a defendant's due-process rights and denies the accused a fair trial. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Ex parte Adams*, 768 S.W.2d 281, 292 (Tex.Crim.App. 1989). In the present case, in addition to the intimidation of Toth, the district attorney knowingly created a false impression for the jury. By asking Toth, on recall to the stand, whether she had contacted him and informed him that she felt that her earlier testimony had "left the wrong impression," and by allowing her to answer "Correct," the district attorney created the impression that Toth voluntarily returned to his office on her own initiative. We cannot sidestep the problem presented by the prosecutor's conduct by dealing with it as a lapse in communication between him and an employee who told him that Toth had called his office, thus rendering his question to her about the phone call "technically accurate, literally true, and legally true," as the State contends in its brief. The salient point is that the district attorney, by his own admission, *initiated* the contact with Toth and implicitly threatened to prosecute her for perjury if she did not change her testimony. Yet, his presentation in front of the jury was calculated to leave the misimpression that she had contacted his office, by phone, on *her* initiative because she thought her testimony had been misleading. This constitutes the knowing use of perjured testimony.

Nor can we conclude that the district attorney's action did not prejudice appellant's defense. Toth's original testimony was important for the defense because she saw the embrace between appellant and Karen Balonis, the extent of which could arguably explain how the blood and saliva got on appellant's vest. The trial court instructed the jury to ignore Toth's second

round of testimony. A simple instruction, however, could not cure the false impression left by the prosecution that, first, Toth had initiated contact with his office and, second, had voluntarily changed her story. Indeed, the court's instruction may well have inadvertently exacerbated the harm. In light of Toth's changing stories, we think it likely that the court's instruction to ignore *part* of her testimony had the effect of convincing at least some jurors that she was simply not a credible witness and that *all* of her testimony should be ignored.

We hold that the district attorney's actions denied appellant a fair trial and violated appellant's due-process rights. Accordingly, the trial court erred in denying appellant's motion for mistrial. We sustain appellant's point of error nine.

SEARCH AND SEIZURE OF BLOOD

In point of error ten, appellant contends that the trial court erred in overruling his objection to evidence obtained as a result of a warrant issued in violation of requirements of the Texas Code of Criminal Procedure. We agree and will also sustain this point of error.

The record shows that a "motion for hair, blood, and sperm samples" was submitted to a magistrate and granted on November 29, 1989. This motion stated that appellant was a suspect in the offense of capital murder and that the State requested an order allowing the police department to acquire samples of blood, body hair, and sperm from him. That portion is signed by the district attorney. An affidavit follows and states:

> I, MONTGOMERY KAMA, being over the age of eighteen (18) years and having personal knowledge based upon my investigation of the same do hereby affirm all statements in the above motion are true and correct, and that said defendant JACK DAVIS is a suspect in a Capital Murder case in Comal County, Texas.

The affidavit is followed by an order of the magistrate granting the motion.

[13-16] Taking blood is a search and seizure under federal and state law. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *Escamilla v. State*, 556 S.W.2d 796 (Tex.CrimApp.

1977). Absent consent, taking a blood sample from a defendant in custody requires a validly obtained warrant. *Smith v. State*, 557 S.W.2d 299, 301-02 (Tex.Crim.App. 1977). A warrant may be issued to search for and seize property or items that are evidence of an offense or which tend to show that a particular person committed an offense. Tex. Code Crim.Proc.Ann. art. 18.02(10) (Supp.1992). To justify the issuance of a search warrant under article 18.02(10), there must be a supporting affidavit setting out sufficient facts to establish probable cause that a specific offense has been committed, that the specifically described property or items that are to be searched for or seized constitute either evidence of that offense or evidence that a particular person committed that offense, and that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. Tex.Code.Crim.Proc.Ann. art. 18.01(c) (Supp.1991). *Compare Mulder v. State*, 707 S.W.2d 908, 915-16 (Tex.Crim.App.1986) (affidavit for a search warrant to take a blood sample held insufficient) *with Marquez v. State*, 725 S.W.2d 217, 233-34 (Tex.Crim.App.) (affidavit held sufficient), *cert. denied*, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987).

[17] The affidavit in this cause does not establish probable cause to issue a search warrant. The affidavit itself does not even state that the evidence to be searched for and seized is the defendant's blood. No facts whatsoever are set out in the affidavit to show that the items to be searched for are evidence of a crime or show that the person involved committed the offense. The motion to which the affidavit was attached simply states that appellant is a suspect in the offense and then requests the blood, hair, and sperm samples. The only statement that the affidavit swears is true is that appellant is a suspect in the murder of Kathie Balonis in Comal County.

The State contends that, notwithstanding the inadequacy of the affidavit to establish probable cause for the issuance of the warrant, the evidence should not be excluded because the officers who performed the search did so in good faith, reasonably relying on a warrant issued by a magistrate. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *Leon*, a magistrate issued a facially valid search warrant on the basis of an affidavit that related information obtained from a confidential informant and recited the results of police surveillance of several suspects.

Although the district court later found the question to be very close, it held the affidavit to be insufficient because the confidential informant was of unproven reliability; without his information, the events observed during police surveillance were inadequate to establish probable cause. Nonetheless, the Supreme Court held that the evidence, because obtained in reasonable, good-faith reliance on a warrant, should not have been excluded.

[18] In the present case, the State's first obstacle to the admission of the challenged evidence is the Texas statutory exclusionary rule. Tex.Code Crim.Proc.Ann. art. 38.23 (Supp.1992). Article 38.23(b) creates an exception to the general rule for evidence obtained by a law-enforcement officer acting in objective, good-faith reliance on a warrant issued by a neutral magistrate *based on probable cause.* This statute is not a codification of *Leon,* because it requires a finding of probable cause, while "the exception enunciated in *Leon* appears more flexible in allowing a good faith exception if the officer's belief in probable cause is reasonable." *Gordon v. State,* 801 S.W.2d 899, 913 (Tex.Crim.App.1990); *see also Eatmon v. State,* 738 S.W.2d 723 (Tex. App.1987, pet. ref'd) (statutory good-faith exception inapplicable where search warrant not supported by probable cause); *see also Imo v. State,* 822 S.W.2d 635 (Tex.Crim.App.1991) (defendant who moves to suppress evidence on statutory grounds automatically invokes article 38.23); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience,* 59 Tex.L.Rev. 191 (1981). The present circumstances do not fall within the exception contained in article 38.23(b).

We further conclude that the evidence in question here was not admissible even under *Leon's* more flexible good-faith exception. *Leon* emphasizes that a magistrate must be "detached and neutral,: not a rubber stamp for the police. *Leon,* 468 U.S. at 914, 104 S.Ct. at 3416. Moreover an officer does not manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923, 104 S.Ct. at 3421. These principles enunciated in *Leon* do not permit the admission of the blood sample taken from appellant in the present case. The affidavit on

which the warrant was based is completely lacking in facts to support a finding of probable cause. Thus, no reasonable, good-faith reliance by the officers was manifested.

[19-21] The State also contends that this error was not preserved. The State asserts that the record fails to show that appellant ever objected to the blood being admitted into evidence on the specific ground that it was illegally seized or that the affidavit was insufficient to show probable cause, other than in a pretrial motion to suppress. But where, as here, the pretrial motion to suppress is heard and overruled, further objection at trial is unnecessary. Tex.R.App.P. 52(b). Moreover, the trial record shows that after establishing that the officer obtained the blood sample pursuant to the "motion to take blood," defense counsel objected to any evidence seized on the ground that the motion was not a valid search warrant. The district attorney argued that the "good faith exception" allowed admission, and the trial court agreed. When the judge then allowed the district attorney to proceed with expert testimony regarding the blood, counsel again objected. We conclude that appellant properly preserved the error.[4]

We sustain appellant's point of error ten. Moreover, because the evidence relating to the blood sample was important forensic evidence, we are not able to conclude that the error was harmless, i.e., we are not able to determine beyond a reasonable doubt that its erroneous admission made no contribution to the conviction. *See* Tex. R.App.P. 81(b)(2).

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4. In its brief, the State also displays a general misunderstanding of what must be done to preserve error. A party must complain only until he receives an adverse ruling. *Ramirez v. State*, 815 S.W.2d 636, 643 (Tex.Crim.App.1991). Thus, when an objection is *overruled*, it is not necessary, in order to preserve error, to request an instruction or a mistrial. Only if an objection is *sustained* must the party making the objection then request an instruction, if one is desired. If the instruction is given, the party must then request a mistrial, if one is desired. Otherwise, the objecting party has received all of the relief requested and no harm has been done about which to complain. *Brooks v. State*, 642 S.W.2d 791, 798 (Tex.Crim.App.1982).

OTHER POINTS OF ERROR

Because we reverse on points nine and ten, we need not address appellant's other points of error. In light of our disposition of the appeal, however, we will discuss some of the other complaints appellant has raised on appeal in order to provide guidance for the trial court in the event of retrial.

Lost Evidence

Appellant contends that the court erred in overruling his motion to dismiss for due process violations based on the State's negligent investigation of the case (point two) and on the intentional destruction of exculpatory evidence (point three). Appellant points out that photographs and negatives were missing, that hairs found in the victim's hand and mouth were missing, that a tape recording of an interview with the victim's next-door neighbor immediately after the discovery of the body was erased, and that the vials of blood tested by Zain were destroyed.

[22, 23] Three factors are relevant in determining whether the failure to preserve evidence has resulted in a violation of due process: (1) the likelihood that the lost evidence was exculpatory; (2) the likelihood that the defendant was significantly prejudiced at trial by the absence of the evidence; and (3) the level of government culpability. *Gardner v. State*, 745 S.W. 2d 955, 958-59 (Tex.App.1988, no pet.); *see also Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *Ex parte Brandley*, 781 S.W.2d 886 (Tex.Crim.App. 1989); *State v. Shelton*, 802 S.W.2d 80, 82 (Tex.App.1990, pet. granted). Failure to preserve potentially useful evidence, absent a showing of bad faith on the part of the police, does not, in and of itself, result in a denial of due process of law. *Arizona v. Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337. The accused must show that the police conduct itself indicates that the evidence could form a basis for exonerating the appellant. *Id.*

[24] We do not find in the present record evidence of misconduct sufficient to compel the conclusion that the police or their agents acted

in bad faith regarding the failure to preserve evidence. Accordingly, the denial of appellant's motion to dismiss on this basis has not been shown to be error.

Impeachment

[25] Appellant contends in point of error sixteen that the trial court erred in refusing to permit him to impeach a State's witness as to bias or prejudice. Specifically, he complains that he was not permitted to question the victim's sister about a wrongful-death suit filed by her family against the owners of the apartment complex, even though the State was permitted to question the apartment complex manager about the suit in order to try to show bias on her part.

The Court of Criminal Appeals recently held that in a prosecution for aggravated assault, it was error to prohibit the defendant from cross-examining the victim's mother about a pending suit for damages against the owners of the apartment complex where the assault occurred. *See Shelby v. State*, 819 S.W.2d 544 (Tex. Crim.App. 1991). For the reasons stated in *Shelby*, we conclude that the district court erred by limiting appellant's cross-examination of Karen Balonis on this subject.

Chain of Custody

In point of error twelve, appellant contends that his right to a fair trial was abrogated by the State's failure to establish and prove the chain of custody of both the victim's and appellant's blood. Specifically, he urges that the State failed to adequately explain the end of the chain of custody. The State asserted that Fred Zain, the scientific expert who tested the blood, retained the vials. Zain testified that he later returned the vials to Detective Guerrero. After appellant's objections to the chain of custody, the State recalled Guerrero, who provided the explanation that after Zain returned the vials of blood to him, they were destroyed.

[26-28] In general, proof of the chain of custody is vital to the admissibility of evidence if its relevant characteristics are distinguishable only by scientific tests or analyses. *Hammett v. State*, 578 S.W.2d 699, 708

(Tex.Crim.App.1979); *Edlund v. State*, 677 S.W.2d 204, 210 (Tex.App.1984, no pet.). If the State proves the beginning and the end of the chain of custody, any gaps in between usually go to the weight and not the admissibility of the evidence. *Id.* In this case, the State eventually did prove the end of the chain: the officer testified that he received the samples back from the expert and the samples were then destroyed. The credibility of that explanation was a matter for the jury to decide. The implications of the destruction of evidence have been discussed above. We find no merit in point of error twelve.

Extraneous Offense

Appellant contends that the trial court abused its discretion by permitting the introduction of an alleged extraneous offense into evidence. This point of error relates to the testimony of a resident of the apartment complex that, a few days before the murder, she saw appellant enter the victim's apartment without knocking or turning on lights, even though it was dark outside.

[29] The principles governing the admission of extraneous transactions or offenses have been extensively discussed. *See, e.g., Montgomery v. State*, 810 S.W.2d 372 (Tex.Crim.App.1990); *Willaims v. State*, 662 S.W.2d 344 (Tex.Crim.App.1983); *Albrecht v. State*, 486 S.W.2d 97 (Tex.Crim.App.1972). Among the "exceptions" to the general rule prohibiting the admission of extraneous offenses are: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Tex.R.Crim.Evid. 404(b). The admissibility of an offense is affected by whether its probative value is substantially outweighed by the danger of unfair prejudice. *Banda v. State*, 768 S.W.2d 294 (Tex.Crim.App.), *cert. denied*, 493 U.S. 923, 110 S.Ct. 291, 107 L.Ed.2d 270 (1989); Tex.R.Crim.Evid. 403. A major danger in the use of extraneous transactions or offenses is that the accused will, in effect, be tried for being a "bad person" rather than for the offense with which he is charged.

[30] In the present cause, the State's use of the extraneous transaction does not appear to be an improper attempt to show that appellant was a bad person with a propensity to commit crimes. Rather, the State

offered the resident's testimony in an attempt to show that appellant planned the offense. The prejudicial value of the offense is uncertain—the jury knew that appellant was the maintenance worker at the complex and therefore had access to the apartments. The maintenance logs of the apartment complex had also been introduced by the State and did not agree with appellant's statements about the times he had been in the apartment to do maintenance. Because the extraneous conduct was probative and carried little danger of unfair prejudice, no error is shown.

Cumulative Error

Although appellant does not raise the issue as a separate point of error, he urges throughout his brief that the cumulative effect of the errors in the investigation and trial of his cause denied him due process of law. *Ex parte Brandley,* 781 S.W.2d 886, 894 (Tex.Crim.App.1989), *cert. denied, — U.S. —, 111 S.Ct. 61, 112 L.Ed.2d 35 (1990); Bethany v. State,* 814 S.W.2d 455 (Tex.App.1991, pet. ref'd). We do not reach this contention, as we have found individual errors that require that appellant's conviction be reversed.

It appears to us that appellant's other points of error relate to matters that are not likely to recur in a retrial of this cause; accordingly, we will not address them.

We reverse the judgment of conviction and remand the cause for a new trial.

APPENDIX B

Ex parte JACK WARREN DAVIS,
No. 495-95
Petition for Discretionary Review
From the Third Court of Appeals
(Comal County)

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Applicant, Jack Warren Davis, was convicted of capital murder and sentenced to life in prison. The court of appeals reversed and remanded the cause to the trial court for a new trial. *Davis v. State ("Davis I")*, 831 S.W.2d 426 (Tex.App.-Austin 1992, pet. ref'd). Applicant subsequently filed a pretrial writ of habeas corpus, averring the double jeopardy clauses of the Texas and United States constitutions barred his retrial. The habeas court denied relief, and the court of appeals affirmed. *Ex parte Davis ("Davis II")*, 893 S.W. 2d 252 (Tex. App.-Austin 1995). This Court granted applicant's petition for discretionary review to consider the following ground for review:

Does the rationale of *Bauder v. State*, 921 S.W.2d 696 (Tex.Crim.App. 1996), barring a retrial on state double jeopardy grounds following the granting of a mistrial because of prosecutorial misconduct, apply when the cause goes to a verdict but is reversed on appeal?

At applicant's trial, Fred Zain testified for the State as an expert witness. He testified as to DNA tests he allegedly performed on blood and other evidence, testimony which was found by the court at the habeas hearing to be false. The habeas court also found that the testimony of Lt. Richards, another State witness, was probably inaccurate, as it was based on Zain's testimony. The habeas court concluded Zain's conduct was intentional, outrageous and shocked the conscience of the court.

The court of appeals, in reversing applicant's conviction *(Davis I)*, sustained applicant's contention the district attorney intimidated a witness, Toth, and, in effect, suborned perjury. Toth testified on direct examination she observed applicant and the victim's sister embrace shortly after the murder was discovered. The significance of this testimony is that it supported applicant's version as to how the victim's blood and saliva got onto applicant's vest (the victim's sister attempted to revive her by giving her CPR; while doing so blood from the victim's wounds stained the clothing she was wearing when she embraced applicant thus staining applicant's vest). On redirect examination she confirmed her earlier testimony as to the embrace.

The next day the State recalled Toth. She testified then that, on second thought, she did not actually see applicant and the victim's sister embrace. She testified she saw what she assumed was a just-concluded embrace. Defense counsel asked Toth if anyone had asked her to change her testimony or had threatened her if she did not do so; she said no one had done so.

Upon learning there had been contact between Toth and the district attorney after her testimony on the first day, applicant moved for a mistrial on the ground of prosecutorial misconduct. The trial court conducted an informal hearing outside the presence of the jury.

The district attorney told the court he reviewed statements by two police officers which said applicant had only come halfway up the stairs to the victim's apartment (Toth testified initially the embrace occurred at the top of the stairs). He also reviewed the sister's testimony that she did not embrace applicant. Subsequently, he asked a police officer to contact Toth and for her to call his office. Upon her arrival, he informed her there was a conflict between her testimony and that of other witnesses and that he would present the matter to the grand jury if he could not resolve the conflict. He said he would indict the officers if they had lied, "or the reverse if she had not told the truth." He told her he had already put one person in jail for lying on the stand last year. He finally asked her if she might have been mistaken about having seen a completed embrace; she said she had been mistaken.

The court then asked Toth, after granting her immunity from prosecution for perjury and assuring her she was not going to jail, if she had changed her testimony in response to the threat from the district attorney to have her brought before the grand jury. She answered, under oath, "that's why I changed it." She also told the court the district attorney had frightened and intimidated her. The district attorney and an employee of his office, Filkins, who was present when Toth appeared at his office to discuss her trial testimony, both testified there was no berating or intimidation of Toth; he only expressed his interest in cleaning up the inconsistencies in the testimony of Toth and the police officers. The district attorney did testify he would take anyone involved who was lying to the grand jury.

After the hearing, the trial court ruled there had not been prosecutorial misconduct that would justify a mistrial. He did indicate he would instruct the jury not to consider Toth's second day of testimony for any purpose, which he subsequently did.

The court of appeals acknowledged "it is not improper per se for a trial court judge or prosecuting attorney to advise prospective witnesses of the penalties for testifying falsely." *Davis I, supra,* at 437, citing *United States v. Blackwell,* 694 F.2d 1325, 1334 (D.C. Cir. 1982). The court of appeals characterized the actions of the district attorney as having gone far beyond a cautious or judicious warning to Toth to tell the truth or risk a perjury charge, noting the meeting took place outside the presence of the trial judge. The court of appeals criticized strongly the district attorney for giving the jury the impression that it was *Toth* who first contacted him because she thought her initial testimony was misleading when the opposite was true. The court of appeals found this to be the knowing use of perjured testimony, found it to have denied applicant a fair trial and violated his due process rights, and held the trial court erred in denying applicant's motion for mistrial.[1]

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1. Given the importance of Toth's initial testimony and the taint resulting from the actions of the district attorney, the court of appeals *(Davis I)* found the instruction to the jury to disregard Toth's subsequent testimony insufficient. The court of appeals also sustained applicant's tenth point of error (application for warrant to take a sample

At the habeas hearing, the court's findings of fact noted: (1) certain key items of evidence were lost or mishandled, including hair and blood samples; (2) a taped statement of Marci French, made the night of the homicide, was erased by the police. French, a witness who testified at trial, did make a second taped statement the day after the homicide; (3) a second witness, Hanus, testified the two statements were contradictory as to French's description of the persons she observed leaving the victim's apartment the night of the crime; and (4) Zain committed aggravated perjury and tainted all of the evidence he handled.

The court of appeals, in affirming the denial of habeas relief, concluded "when a trial proceeds to conclusion despite a legitimate claim of serious prejudicial error and the conviction is reversed on appeal, retrial is not jeopardy-barred." *Davis II*, 893 S.W.2d at 254. *See Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192 (1896); *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075 (1976); *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970).

The Supreme Court has held on several occasions that the concept of "continuing jeopardy" is applicable where an individual has obtained a reversal of his conviction. That is because he was not denied his right under the double jeopardy clause to have the charges against him tried to a verdict before the first tribunal. Whereas, where a mistrial takes place, he is denied the opportunity to have the case decided by the first tribunal. Therefore, retrial after reversal of his conviction is not barred by the double jeopardy clause of the United States Constitution. *Price v. Georgia, supra; Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308, 104 S.Ct. 1805, 1813 (1984); *Montana v. Hall*, 481 U.S. 400, 402-403, 107 S.Ct. 1825, 1826 (1987).

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of applicant's blood not supported by affidavit establishing probable cause; *see* Tex. Code Crim. Proc Art. 18.01) and his eleventh point of error (trial court erred in refusing to permit applicant an opportunity to impeach State witness Balonis as to bias or prejudice).

> It is a venerable principle of double jeopardy jurisprudence that the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict (citation omitted), poses no bar to further prosecution on the same charge . . . Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Montana v. Hall, 109 S.Ct. at 1825, 1826; citing *United States v. Tateo*, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589 (1964).

In general, double jeopardy "does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285 (1988). There are a few exceptions to this rule. For example, if a conviction is reversed because the evidence is legally insufficient to convict, retrial is barred because, for double jeopardy purposes, this is equivalent to a judgment of acquittal. *See United States v. Doyle*, 1997 WL 430026 at pg. 3 (7th Cir. 1997), citing *Lockhart v. Nelson*, 488 U.S. at 39.

It is clear applicant's retrial is not barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution.

We note initially that this Court, as well as the Texas Supreme Court, has held that the Texas Constitution gives greater protection in

some instances to Texas citizens than does its federal counterpart. *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992); *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim.App. 1991); *Autran v. State*, 887 S.W.2d 31 (Tex.Crim.App. 1994) (plurality op.). However, until recently, we have consistently held the Texas and United States constitutions' double jeopardy provisions provide substantially identical protections. *Phillips v. State*, 787 S.W.2d 391 (Tex.Crim.App. 1990); *Stephens v. State*, 806 S.W.2d 812 (Tex.Crim.App. 1990). Prior to our opinion in *Bauder, supra*, we have applied the standard of review set forth by the United States Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083 (1982), to double jeopardy claims arising out of instances where mistrials were provoked by the State. *Crawford v. State*, 703 S.W.2d 655 (Tex.Crim.App. 1986); *Collins v. State*, 640 S.W.2d 288 (Tex.Crim.App. 1982) (panel op.); *Anderson v. State*, 635 S.W.2d 722 (Tex.Crim.App. 1982). The supreme Court held the double jeopardy clause of the Fifth Amendment is not offended by a second prosecution for the same offense where the earlier proceeding was terminated by mistrial at the defendant's request unless the State deliberately set out to provoke the defendant's motion for mistrial. *Oregon v. Kennedy, supra.*

In *Bauder* we held that, under the Texas Constitution's double jeopardy clause, "a second prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only where the objectionable conduct of the prosecutor was intended to induce a motion for mistrial, but also when the prosecutor was aware but consciously disregarded the risk that an event for which he was responsible would require a mistrial at the defendant's request... He is accountable for mistrials properly granted by the trial judge when the events making a mistrial necessary were of his own deliberate or reckless doing." *Bauder, supra*, at 699.[2]

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2. Several state supreme courts have explicitly adopted the *Oregon v. Kennedy* standard under their state constitutions. *Robinson v. Commonwealth*, 18 Va.App. 814, 447 S.E.2d 542 (1994); *Stamps v. Commonwealth*, 648 S.W.2d 868 (Ky. 1983); *State v. White*, 332 N.C. 506, 369 S.E.2d 813 (1988). The Pennsylvania Supreme Court's reasoning in *Commonwealth v. Smith*, 615 A.2d 521 (Pa. 1992) is similar to that of *Bauder*.

Bauder, however, is not dispositive with respect to the present case due to a most significant difference: applicant in the present case had his conviction reversed after a full trial on the merits whereas in *Bauder* applicant's trial was never completed (on two occasions) due to State-provoked mistrials. At least one federal appellate court has held that "[double jeopardy would bar retrial after reversal] only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *United States v. Wallach*, 979 F.2d 912, 916 (2nd Circ. 1992), *cert. denied*, 508 U.S. 939 (1993).[3] The Second Circuit noted that this standard embraced that set forth by the Supreme Court in *Oregon v. Kennedy* to bar retrial after a mistrial caused by egregious and intentional prosecutorial misconduct. Applicant has not directed us to any cases, however, where the Supreme Court has explicitly extended *Oregon v. Kennedy* to apply to instances where verdicts of guilty have been reversed on appeal due to prosecutorial misconduct, and therefore holding retrials as jeopardy-barred.

Applicant contends that, under *Bauder*, if mistrial had been granted in this case, retrial of applicant would have been barred. However, this is not the ground on which applicant's petition for discretionary review was granted; as noted earlier we granted review to consider whether the Texas Constitution's double jeopardy protections, as interpreted by this Court in *Bauder*, apply where an applicant has obtained a reversal of his conviction on appeal, due at least in part to prosecutorial misconduct at trial.

With respect to the testimony of Fred Zain, we note the habeas court did not make any findings of fact indicating the State knew, or should have known, Zain's testimony was false or perjured. Indeed, the habeas court found Zain *misled* Lt. Richards, a key State witness, regarding the forensic facts, thus causing Lt. Richards' testimony and conclusions to be probably inaccurate. While we are not bound by the

3. *But see*, however, *United States v. Oseni*, 996 F.2d 186, 187-188 (7th Cir. 1993), in which the court specifically rejected the Second Circuit's holding in *Wallach*, extending *Oregon v. Kennedy* to bar retrial following a reversal due, in part, to prosecutorial misconduct.

findings of fact and conclusions of law of the habeas court, we generally defer to them if they are supported by the record, and, in this instance, find them to be reliable, supported by the record, and entitled to such deference. *Ex parte Tumer*, 545 S.W.2d 470, 473 (Tex.Crim.App. 1977); *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex.Crim.App. 1989); *Ex parte Mowbray*, Tex.Crim.App., No. 72,624 (delivered Dec. 18, 1996). We hold that the State did not intentionally or recklessly cause applicant's trial to be tainted by Zain's perjured testimony or Lt. Richard's inaccurate testimony.

The habeas court also found the police mishandled certain key items of physical evidence and also erased a tape recorded statement of Marci French that may have been exculpatory or otherwise may have been useful to applicant to impeach French. There is no question that applicant would have been entitled to access to the missing tape. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); *Kyles v. Whitley*, 115 S.Ct. 1555 (1995). The record does not support any assertion that the erasure of the tape or the mishandling of physical evidence was the result of intentional or reckless misconduct by the State. *Bauder* does not stand for the proposition that retrial is barred by the Double Jeopardy Clause of the Texas Constitution where a mistrial is granted due to the prosecutor's simple negligence or mere sloppiness. *Bauder* certainly does not forbid, on state constitutional jeopardy grounds, a retrial following a reversal on appeal. Furthermore, the sloppiness and negligence was on the part of the police; the proper remedy for such police actions that, in effect, denied applicant due process of law is retrial. *Brady v. Maryland, supra; Kyles v. Whitley, supra.*

The actions of the prosecutor in the present case were reprehensible. The habeas court found the prosecutor misled the jury as to why certain evidence was not tested and misled the jury as to the quality of the investigation conducted by the police (he told the jury it was excellent when he had, before trial, complained in writing about the lost evidence and negligence of the police department). As to his out-of-court conversation with witness Toth, while we find it was poorly and coercively handled, we do not agree with the court of appeals in *Davis I* that Toth was encouraged to perjure herself or otherwise mis-

represent her observations to the jury. We are troubled by the false impression given to the jury that Toth approached the prosecutor out of concern that her initial testimony was potentially misleading when it was the prosecutor who approached her. Still, we are not persuaded that the actions of the prosecutor were so egregious as to bar the retrial of applicant on Texas constitutional double jeopardy grounds, as he has already been accorded the relief to which he was entitled: reversal of his conviction on appeal.

Applicant cites a recent decision of the New Mexico Supreme Court in support of his contention that the holding of *Bauder* be extended to cases involving prosecutorial misconduct where convictions have been reversed on appeal (thereby barring retrial by the Texas Constitution's double jeopardy provisions). *State v. Breit*, No. 21,594 (N.Mex.) (delivered Dec. 6, 1996). In *Breit*, applicant's conviction was reversed, and, on double jeopardy grounds, the court ordered applicant discharged from any further prosecution in that cause.

The court emphasized that "when a trial is severely prejudiced by prosecutorial conduct, the double jeopardy analysis is identical, whether the defendant requests a mistrial, a new trial, or, on appeal, a reversal." *Briet, supra*, at 5. Yet, the court fails to cite any federal appellate court opinions or opinions of other state high courts[4] in support of its holding that double jeopardy principles are applicable where a defendant has obtained a reversal of his conviction on appeal due, at least in part, to prosecutorial misconduct during his first trial, thereby barring his retrial.[5]

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4. The North Carolina Supreme Court did affirm the North Carolina Court of Appeals' holding that a retrial following reversal on appeal should be jeopardy-barred where the reversal was due to prosecutorial overreaching or harassment aimed at prejudicing the defendant's chances for acquittal, whether in the current trial or a retrial. *State v. White*, 354 S.E.2d 324, 329 (N.C.Ct.App. 1987), aff'd, 322 N.C. 506, 369 S.E.2d 813 (N.C. 1988).

5. The actions of the prosecutor in *Breit* were pervasively improper, intentional, and tainted nearly every phase of the trial, from opening statement to closing argument. *See Breit, supra, Appendix.* The prosecutorial misconduct in the present case, though significant, is by no means comparable to that which took place in *Breit.*

What took place in the present case is, in may respects, similar to what we found to compel reversal on due process grounds in *Cook v State*, No. 71,855 (Tex.Crim.App.) (delivered Nov. 6, 1996). In *Cook*, we found prosecutorial misconduct, which included withholding of potentially exculpatory evidence,[6] combined with the false and misleading testimony of a state's expert witness concerning fingerprint evidence, violated applicant's rights under the Due Process Clause of the United States Constitution, as well as his rights under the due course of law provisions of the Texas Constitution (Art. I, Secs. 13 and 19). We declined, however, to accept applicant's contention the prosecution's misconduct was so egregious as to bar retrial on either state or federal double jeopardy grounds.

As the court of appeals noted, "in considering other cases where the facts and circumstances were fully as outrageous and shocking as those in this case, the Court of Criminal Appeals has ordered a retrial and not the dismissal of charges and an acquittal." *Davis II*, 893 S.W.2d at 257, citing *Ex parte Adams*, 768 S.W.2d 281 (Tex.Crim.App. 1989); *Ex parte Brandley*, 781 S.W.2d 886, 887 (Tex.Crim.App. 1989). We agree with the court of appeals that retrial, not dismissal of the charge and acquittal, is the proper remedy.

Fundamentally, this is a due process case. It has long been the law that where a defendant's due process rights have been violated to the extent that he has been denied a fair trial, the proper remedy is reversal of his conviction and remand of the cause to the trial court for further proceedings. *Brady v. Maryland, supra; Kyles v. Whitley, supra; United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). We decline applicant's invitation to extend our interpretation of the Texas Constitution's double jeopardy protections in *Bauder* to instances like the present case which involve due process concerns for which the well-established remedy of reversal is intended to address. *Bauder*

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6. This evidence included evidence of misrepresentation of a deal between a convicted criminal and the State to testify (falsely, it turned out) against applicant, evidence pointing to another person as a viable suspect, and evidence concerning a key prosecution witness (Hoehne), which indicated he may have perjured himself.

applies only where a mistrial has been granted due to reckless or intentional prosecutorial misconduct; therefore it does not apply to the present case as no mistrial was granted and we further find no abuse of discretion on the part of the trial court in its denial of applicant's mistrial motion.

Accordingly, we decline to apply our holding in *Bauder* to instances, like the present case, to bar a retrial, on Texas constitutional double jeopardy grounds, where an applicant has had his conviction reversed on appeal due, at least in part, to prosecutorial misconduct.[7]

We affirm the judgment of the court of appeals.

—MANSFIELD, J.

DELIVERED SEPTEMBER 17, 1997
EN BANC
PUBLISH
KELLER, J., CONCURS IN THE RESULT.
OVERSTREET, J., DISSENTS.

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7. The dissent fails to recognize the considerable adverse impact of a reversal of a conviction on the State. The State must decide whether or not to retry the cause, a decision often complicated by the passage of several years since the first trial, the possible loss of evidence over time and the fact that witnesses may no longer be available or their memories of the event may be less reliable, rendering their testimony less accurate. The cost to the State of a "second bite of the apple" is significant, financially and otherwise (indeed, the State often elects *not* to pursue a retrial following a reversal; *see*, e.g., *Ex parte Brandley, supra)*; the dissent's implicit dismissal of this fact is troubling. Our holding in the present cause cannot be read as sanctioning prosecutorial misconduct, misconduct for which the well-established remedy of reversal was correctly applied in this case by the court of appeals. We should decline to create a new remedy, the expansion of *Bauder* to bar retrial on Texas constitutional grounds after reversal due to prosecutorial misconduct, where there is no compelling need to do so. The well-established remedy of reversal has not been demonstrated as being inadequate to deter prosecutorial misconduct so as to justify an extension of *Bauder*.

Finally, the evidence that the State intentionally acted in an improper manner at the first trial so as to avoid the risk of an acquittal is simply not supported by the record. Assuming, *arguendo*, there was no prosecutorial misconduct during appellant's trial, he does not persuade us the evidence was factually or legally insufficient to support a conviction, which would bar his retrial. *Lockhart v. Nelson, supra.*

APPENDIX C

THE COURT OF CRIMINAL APPEALS OF TEXAS

OCTOBER 15, 1997

HABEAS CORPUS RELIEF GRANTED-OPINIONS BY THE COURT:

72,908 EX PARTE MICHAEL DURWOOD NEAL FROM HARRIS COUNTY
72,909 EX PARTE BRYCE KARSTON TUBB FROM HARRIS COUNTY
72,910 EX PARTE GEORGE ANDERSON DART FROM WILLIAMSON COUNTY
72,911 EX PARTE PERRY COMO DENBY FROM HARRIS COUNTY
72,912 EX PARTE PERRY COMO DENBY FROM HARRIS COUNTY
72,913 EX PARTE NOE CANTU FROM WEBB COUNTY

ON APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW:

0228-97 CHARLES DAVOY DEAN FROM HARRIS COUNTY
JUDGMENT OF COURT OF APPEALS VACATED;
CAUSE REMANDED TO COURT OF APPEALS -
OPINON JUDGE MEYERS

APPELLANT'S MOTION FOR REHEARING ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW DENIED:

0495-95 DAVIS, JACK WARREN FROM COMAL COUNTY
(JUDGE BAIRD WOULD GRANT)
(MOTION FOR STAY OF MANDATE GRANTED FOR 90 DAYS)
0616-97 BURNS, SEAN TIMOTHY FROM HARRIS GOUNTY

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW REFUSED:

0419-97	OROZCO, RUDY (JUDGE BAIRD WOULD GRANT)	Dallas County	05-92-02619-CR
0420-97	OROZCO, RUDY (JUDGE BAIRD WOULD GRANT)	Dallas County	05-92-02620-CR
0541-97	COLEMAN, KENNETH	Gregg County	12-94-00283-CR
0693-97	LY, THANH TROUNG	Fort Bend County	01-96-00099-CR
0694-97	PONCE, FELIPE LOPEZ	Harris County	01-95-00367-CR
0698-97	ESTRADA, EFRAIN, JR.	Harris County	01-94-01055-CR
0705-97	BRANCH, SCHANDULA SHEREE	Harris County	01-95-01557-CR
0706-97	BRANCH, SCHANDULA SHEREE	Harris County	01-95-01558-CR
0728-97	VIA, DAVID PAUL	Midland County	08-95-00021-CR
0746-97	FARRIS, MICHAEL STEPHEN	Dallas County	07-95-00189-CR
0816-97	STEVENSON, BRODRICK D.	Lubbock County	07-97-00005-CR
0822-97	TUFFIASH, CHARLES MARK	Bexas County	04-96-00481-CR
0835-97	CROSS, DAVID LEE	Potter County	07-96-00188-CR
0843-97	MCADAMS, DANNY HOWARD	Upton County	08-95-00321-CR
0851-97	REAVIS, GARY WINDLE	Bell County	03-95-00659-CR

Supreme Court, U.S.
FILED

97 1313 JAN 13 1998

OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JACK WARREN DAVIS
Petitioner,

v.

THE STATE OF TEXAS
Respondent

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

CAPITAL CASE

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SUPPLEMENTAL APPENDIX

Appendix D Ex parte Jack Warren Davis, 893 S.W.2d 252 (Tex. App.--Austin 1995, pet. granted) s1a

Appendix E Postcard from the Texas Court of Criminal Appeals Granting Petition for Discretionary Review s17a

Appendix F Ex parte Jack Warren Davis, No. 495-95 (Tex. Crim. App. Sept. 17, 1997) s18a

APPENDIX D

Ex Parte Jack Warren DAVIS, Appellant.

No. 03-93-00646-CR.

Court of Appeals of Texas,
Austin.

Feb. 8, 1995.

Rehearing Overruled March 15, 1995.

Defendant was convicted in the 22nd Judicial District Court, Comal County, of capital murder, and he appealed. The Court of Appeals, 831 S.W.2d 426, J., reversed and remanded. On remand, the District Court, Charles R. Ramsay, J., denied defendant's pretrial writ of habeas corpus alleging that retrial was barred by double jeopardy. Defendant appealed. The Court of Appeals, Carl E.F. Dally, J. (assigned), held that: (1) State Constitution did not provide greater protection against violation of double jeopardy than did Federal Constitution; (2) retrial was not barred by double jeopardy clause; and (3) errors in initial prosecution entitled defendant to new trial but not to dismissal and acquittal.

Affirmed.

1. Double Jeopardy Key 107.1

When trial proceeds to conclusion despite legitimate claim of serious prejudicial error and conviction is reversed on appeal, retrial is not jeopardy barred. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy Key 109

Insufficiency of evidence is exception to rule that, in general, retrial is not jeopardy barred when trial proceeds to conclusion despite legitimate

claim of serious prejudicial error and conviction is reversed on appeal. U.S.C.A. Const.Amend. 5.

3. Double Jeopardy Key 2

While Texas Constitution may in some instances give greater protection to Texas citizens than is given by United States Constitution, Texas double jeopardy provision does not give greater rights or protection than does Fifth Amendment of Constitution. U.S.C.A. Const.Amend. 5; Vernon's Ann.Tex Const. Art. 1, § 14.

4. Double Jeopardy Key 98

Texas Constitution did not preclude retrial of defendant after jury convicted defendant of capital murder but was unable to answer special issue on deliberativeness.

5. Double Jeopardy Key 97

Defendant was entitled to retrial, and not dismissal of charge and acquittal, after his due process rights were violated in initial trial as result of prosecutorial misconduct. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Const. Art. 1, §§ 13, 19.

Stanley G. Schneider, Houston, for appellant.

Bill M. Reimer, Dist. Atty., New Braunfels, Raymond E. Taylor, Taylor, Holiner & Spicer, P.C., San Antonio, for State.

Before POWERS, KIDD and DALLY,* JJ.

CARL E.F. DALLY, Judge (Assigned).

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* Before Carl E.F. Dally, Judge (retired), Court of Criminal Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1988).

Appellant Jack Warren Davis appeals from the trial court's order denying relief in a pretrial habeas corpus proceeding in which appellant urged his retrial was jeopardy barred. A jury previously convicted Davis of capital murder. Act of April 16, 1985, 69th Leg., R.S., ch. 44, § 1, 1985 Tex.Gen.Laws 434 (Tex.Penal Code Ann. § 19.03(a)(2), (b), since amended). When the jury was unable to answer the special issue on deliberateness, the court assessed punishment at incarceration for life. *Id.* § 2 at 434 (Tex.Code Crim. Proc. art. 37.071, since amended). On appeal, this Court reversed the judgment and remanded the cause to the trial court for a new trial. *Davis v. State*, 831 S.W.2d 426 (Tex.App.—Austin 1992, pet. ref'd).

After remand, appellant filed a pretrial writ of habeas corpus moving the trial court to dismiss the prosecution. Appellant alleged that his retrial was barred by double jeopardy and due process provisions of the United States Constitution. U.S. Const. amend. V, XIV. Appellant also alleged that his retrial was barred by the double jeopardy and due course of law provisions of the Texas Constitution. Tex. Const. art. I, §§ 13, 14, 19. The trial court issued the writ and convened an evidentiary hearing. After the hearing, the trial court made findings of fact and conclusions of law and entered an order denying the writ and the relief requested. The appeal followed. Tex.R.App.P. 44. We will affirm the trial court's order.

The facts adduced at appellant's trial were summarized in this Court's opinion on appeal. *Davis*, 831 S.W.2d at 429-33. The facts elicited in the habeas corpus hearing are summarized in the trial court's findings of fact. In the Appendix of this opinion is a copy of those findings of fact, the court's conclusions of law, and the order denying the writ.

In his first point of error, appellant asserts that his retrial is barred by the Fifth Amendment Double Jeopardy Clause. On original appeal, this Court held that the evidence was legally sufficient to support the jury's verdict. The judgment was reversed because the prosecutor's misconduct in threatening witnesses and in knowingly using perjured testimony deprived appellant of a fair trial and denied him due process. In addition, we held that the admission of evidence derived from an unlawfully obtained blood specimen was reversible error. To provide "guidance for the trial court in the event of

retrial," we found that "the present record evidence of misconduct [was not] sufficient to compel the conclusion that the police or their agents acted in bad faith regarding the failure to preserve evidence."

On original appeal, we also held that the trial court erred in refusing appellant's motion for mistrial on grounds of prosecutorial misconduct. Without due regard for the remainder of the opinion, appellant makes this holding the foundation for his entire appellate argument. In support of his double jeopardy claims, appellant relies heavily on many cases concerned with jeopardy problems arising from mistrials that were granted *prior to verdict.* Since a mistrial was not granted in this case and the trial proceeded to a verdict, the authorities concerning mistrials granted before a verdict do not control our disposition of this appeal. The failure to grant the mistrial was trial error and we held that the proper remedy was retrial.

[1,2] When a trial proceeds to conclusion despite a legitimate claim of serious prejudicial error and the conviction is reversed on appeal, retrial is not jeopardy barred. *Ball v. United States,* 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896); *United States v. Dinitz,* 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). Insufficiency of evidence is an exception to this rule. *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). As the United States Supreme Court observed in *Oregon v. Kennedy:*

> The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. *United States v. Dinitz,* 424 U.S. 600, 606, 47 L.Ed.2d 267, 96 S.Ct. 1075 [1079] (1976). As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter,* 336 U.S. 684, 689, 689, 93 L.Ed. 974, 69 S.Ct. 834 [837] (1949). The Double Jeopardy Clause, however, does not offer a guaranty to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding. *United States v. Jorn,* 400 U.S. 470, 483-484, 27 L.Ed.2d 543, 91 S.Ct. 547 [556-57] (1971) (plurality opinion); *Wade v. Hunter,* 336 U.S. at 689, 93 L.Ed. 974, 69 S.Ct. 834 [at 837]. If the law were otherwise, "the pur-

> pose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Ibid.*

Oregon v. Kennedy, 456 U.S. 667, 671-72, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416 (1982). In *Justices of Boston Municipal Court v. Lydon,* the court stated:

> The Double Jeopardy Clause is not an absolute bar to successive trials. The general rule is that the Clause does not bar reprosecution of a defendant whose conviction is overturned on appeal. *United States v. Ball, supra.* The justification for this rule was explained in *United States v. Tateo,* 377 U.S. 463, 466, 12 L.Ed.2d 448, 84 S.Ct. 1587 [1589] (1964), as follows:
>
> > While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.
>
> In *Price v. Georgia,* 398 U.S. 323, 329, 26 L.Ed.2d 300, 90 S.Ct. 1757 [1761] (1970), we recognized that implicit in the *Ball* rule permitting retrial after reversal of a conviction is the concept of "continuing jeopardy." *See also Breed v. Jones,* 421 U.S. 519, 534, 44 L.Ed.2d 346, 95 S.Ct. 1779 [1788] (1975). That principle "has application where criminal proceedings against an accused have not run their full course." 398 U.S., at 326, 26 L.Ed.2d 300, 90 S.Ct. 1757 [at 1759]. Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver.

Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 308, 104 S.Ct. 1805, 1813, 80 L.Ed.2d 311 (1984). Finally in *Montana v. Hall*, the court observed:

> It is a "venerable principl[e] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, *Burks v. United States*, [437 U.S. 1 [57 L Ed 2d 1, 98 S Ct 2141] (1978)], poses no bar to further prosecution on the same charge." *United States v. Scott*, 437 US 82, 90-91, 57 L Ed 2d 65, 98 S Ct 2187 [2193] (1978). *See generally* 3 W. LaFave & J. Israel, Criminal Procedure § 24.4 (1984). Justice Harlan explained the basis for this rule:
>
> > Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. *United States v. Tateo*, 377 US 463, 466, 12 L Ed 2d 448, 84 S Ct 1587 [1589] (1964).

Montana v. Hall, 481 U.S. 400, 402-03, 107 S.Ct. 1825, 1826, 95 L.Ed.2d 354 (1987); *see also United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

We find no Supreme Court authority for holding that appellant's retrial is barred by the Double Jeopardy Clause of the Fifth Amendment. The authorities we have cited allow appellant's retrial. Appellant's first point of error is overruled.

In his second point of error, appellant urges that even if the Fifth Amendment does not bar his retrial, the double jeopardy provision of the Texas Constitution does. The Fifth Amendment Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Texas Constitution provides that: "No person, for the same offense, shall be twice put in jeopardy of life or liberty." Tex. Const. art. I, § 14.

[3] Appellant points out that the Court of Criminal Appeals and the Texas Supreme Court have held that in some instances the Texas Constitution gives greater protection to Texas citizens that does the United States Constitution. *Sax v. Votteler,* 648 S.W.2d 661 (Tex.1983); *Davenport v. Garcia,* 834 S.W.2d 4 (Tex. 1992); *Heitman v. State,* 815 S.W.2d 681 (Tex.Crim.App.1991). However, appellant has not cited any authorities holding that the Texas double jeopardy provision gives greater rights or protection than does the Fifth Amendment. Appellant argues that we should follow the courts of four states that have recently held that their state constitution double jeopardy provisions give greater rights than does the Fifth Amendment Double Jeopardy Clause. We decline to do so, since the Court of Criminal Appeals has held that the state and federal double jeopardy provisions are "conceptually identical." *Stephens v. State,* 806 S.W.2d 812, 814-15 (Tex.Crim.App.1990); *Phillips v. State,* 787 S.W.2d 391, 393 n. 2 (Tex.Crim.App.1990). Several courts of appeals have applied the Court of Criminal Appeals view that state and federal double jeopardy provisions are conceptually identical and that the Texas double jeopardy guarantee gives no greater rights than does the federal guarantee. *Parrish v. State,* 889 S.W.2d 658 (Tex.App.—Houston 1994, no pet. h.); *Ex parte Tomlinson,* 886 S.W.2d 544, 546 (Tex.App.—Austin 1994, no pet.); *Wright v. State* 866 S.W.2d 747, 750-51 (Tex.App.—Eastland 1993, pet. ref'd); *Lozano v. State,* 860 S.W.2d 152, 154, n. 3 (Tex.App.—Austin 1993, pet. ref'd); *Smith v. State,* 842 S.W.2d 401, 405 (Tex.App.—Fort Worth 1992, pet. ref'd); *Wiggins v. State,* 816 S.W.2d 472, 473 (Tex.App.—Houston [14th Dist.] 1991, pet. ref'd); *Heyduck v. State,* 814 S.W.2d 156, 157 (Tex. App—Houston [1st Dist.] 1991, no pet.); *see also Alfred v. State,* 720 S.W.2d 218 (Tex. App. Dist. Houston [14th Dist.] 1986, pet. ref'd).

Because the Court of Criminal Appeals has said that the double jeopardy provisions of the state and federal constitutions are conceptually identical, the decision of the Court of Criminal Appeals in *Durrough v. State*, 620 S.W.2d 134 (Tex.Crim..App.1981), applying the Fifth Amendment Double Jeopardy Clause applies equally to the Texas Constitution's double jeopardy provision.

> The appellant also contends that his last trial was barred by the doctrine of double jeopardy because of willful prosecutorial misconduct that occurred during the second trial of this case. The appellant claims that at the second trial the prosecution failed to disclose favorable evidence regarding deals with accomplice witnesses made in exchange for their testimony. He concludes that this willful misconduct barred any future prosecution for this offense. We find no support for the appellant's contention. The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrials so as to afford the prosecution a more favorable opportunity to convict the defendant. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). But when the trial proceeds to its conclusion despite a legitimate claim of seriously prejudicial error, the Double Jeopardy Clause will present no obstacle to a retrial if the conviction is reversed on appeal. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). In the present case the alleged misconduct did not result in a mistrial. The appellant was found guilty of capital murder and sentenced to death. That judgment was reversed on appeal and the case was remanded for a new trial. We reject the appellant's contention that the alleged misconduct was a bar to further prosecution for this offense.

Durrough, 620 S.W.2d at 138-39.

[4] More recently in *Ex parte Fortune*, 797 S.W.2d 929 (Tex.Crim.App.1990), the Court of Criminal Appeals expounded:

> As in the case of the Fifth Amendment Double Jeopardy Clause of the federal constitution, Article I, Section 14 of the Texas Constitution

> protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.
>
> . . . . .
>
> [U]pon reversal of a conviction on grounds other than sufficiency of evidence, the State is free to retry the defendant on the charge and obtain a valid conviction against him in the interest of justice.
>
> . . . . .
>
> We therefore hold that the Double Jeopardy Clause presents no bar for the government's retrial of appellant who was successful in setting aside his first conviction because of an error in the proceedings leading to the first conviction.

797 S.W.2d at 932, 934, 936. *See also Lewis v. State.* 889 S.W.2d 403 (Tex.App.—Austin 1994, pet. filed). We hold that Article I, section 14 of the Texas Constitution does not bar appellant's retrial and overrule appellant's second point of error.

In point of error three, appellant contends that independent of his double jeopardy claim, his retrial is barred by the due process provision of the United States Constitution. U.S. Const. amend. XIV. In point of error four, appellant contends that independent of his double jeopardy claim, his retrial is barred by the due course of law provision of the Texas Constitution. Tex. Const. art. I, §§ 13, 19. Appellant asserts that the conduct of the prosecutor and his team in this case was so outrageous that it violated his rights to a fair *retrial,* if one is allowed, and thereby denies him due process and due course of law.

On original appeal we found that appellant had been deprived of due process, reversed the judgment of conviction, and granted appellant a new trial. Additional facts which may have been discovered in the ex parte proceeding convened after reversal and remand do not call for the revision of our judgment or require the dismissal of the charge and appellant's acquittal. In considering other cases where the facts and circumstances were fully as outrageous and shocking as those in this case, the Court of Criminal

Appeals has ordered a retrial and not the dismissal of charges and an acquittal. *See Ex parte Adams*, 768 S.W.2d 281 (Tex.Crim. App.1989); *Ex parte Brandley*, 781 S.W.2d 886, 887 (Tex.Crim.App.1989).

In *Adams* , the appellant urged a violation of the due course of law provision of Article I, section 19 of the Texas Constitution as well as the Due Process Clause of the Fourteenth Amendment. The Court of Criminal Appeals said:

> The constitutional principles requiring disclosure of evidence favorable to an accused and the prohibition on knowingly using false evidence to convict are basic to the due process of law mandated by the Fourteenth Amendment. Such rights are equally applicable to the due course of law rights identified in Art. I, § 19 of the Texas Constitution.

768 S.W.2d at 293.

In the more recent case of *Ex parte Castellano*, 863 S.W.2d 476 (Tex.Crim.App.1993), the trial court found that Castellano had been denied both due process and due course of law, but denied relief in the "absence of case law as precedent." The court of appeals affirmed in an unpublished opinion. The Court of Criminal Appeals granted review to determine whether the court of appeals had decided an important issue of state and federal law in conflict with the *Adams* decision. The Court of Criminal Appeals reversed the judgment of the court of appeals and remanded the cause to the trial court. The charge was not dismissed. In *Castellano*, the Court of Criminal Appeals discussed and relied on *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957). In *Alcorta*, the Supreme Court found that the use of perjured testimony denied Alcorta due process but did not order the dismissal of charges and the acquittal of Alcorta. Neither did the Court of Criminal Appeals on remand dismiss the charges; it instead remanded the cause to the trial court. *Alcorta v. State*, 308 S.W.2d 519 (Tex.Crim.App.1957).

[5] Appellant is entitled to a new trial under both the Due Process Clause of the Fourteenth Amendment and Article I, sections 13 and 19 of the Texas Constitution. Appellant was granted the new trial on his appeal

to this Court. We remain convinced that retrial, not dismissal of the charge and acquittal, is the proper remedy. We overrule appellant's third and fourth points of error.

The trial court's order denying habeas corpus relief is affirmed.

Affirmed.

APPENDIX

NO. CR-89-251-A

EX PARTE
JACK WARREN DAVIS
IN THE 22ND JUDICIAL
DISTRICT COURT OF
COMAL COUNTY, TEXAS

ORDER

On this the 17th day of November 1993, after having issued the writ of habeas corpus, hearing evidence incident thereto and the arguments of counsel regarding the Applicant's pretrial writ of habeas corpus in which the Applicant alleges that the state's prosecution be barred by the double jeopardy provisions of the Fifth Amendment of the United States Constitution and Article I Section 14 of the Texas Constitution, that the prosecution be dismissed based upon a violation of Applicant's right to due process as defined by the Fifth Amendment and Fourteenth Amendment to the United States Constitution and that exculpatory evidence was intentional destroyed by agents of the State, the Court denies Applicant's requested relief.

Signed on this the 10 day of December 1993.

/s/ Charles R. Ramsay
JUDGE PRESIDING

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having heard the evidence presented at the hearing on Applicant's application for writ of habeas corpus, having seen the witnesses testify, judged their credibility and being fully informed, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

A. Fred Zain's Testimony

1. Fred Zain was an employee of the Bexar County Forensic Science Center who testified for the State in Applicant's trial.

2. Comal County paid the Bexar County Medical Examiner for Zain's services as an expert witness and not for the performance of any scientific testing of evidence in Applicant's trial.

3. Zain testified at the trial that he performed the scientific tests on blood and other evidence in connection with this case.

4. Zain did in fact not conduct the DNA tests noted in his report.

5. It is highly probable that Zain committed aggravated perjury in testifying at Applicant's trial concerning the results of some or all of the scientific tests he said he conducted. Specifically, Zain committed aggravated perjury in the following ways:

a. He testified that he had personally conducted scientific tests when in fact he did not.

b. He testified that certain pieces of physical evidence contained Applicant's blood when in fact he knew or should have known that these pieces of evidence did not contain Applicant's blood.

6. Zain is not credible under oath.

7. At the hearing on Applicant's application for writ of habeas corpus, Zain invoked his right against self incrimination as guaranteed by the Fifth Amendment after being admonished of his rights by the trial court and after admitting that his employment had been terminated because of evidence in his possession being lost.

8. Zain's scientific evidence was not reliable.

9. Zain's reports and testimony served as the basis for the opinions, testimony and conclusions of Lt. Ed Richards.

10. The State's theory of prosecution was premised on the testimony of Lt. Richards and Zain. Zain misled Lt. Richards regarding the forensic facts, thus causing Lt. Richards' testimony and conclusions to be probably inaccurate.

11. Zain was employed by the Comal County District Attorney to conduct the serology testing of the evidence in this case.

12. Zain's conduct was intentional and outrageous and shocked the conscience of the court.

13. The Court is familiar with the holdings of the West Virginia Supreme Court in *The Matter of the West Virginia State Police State Police Crime Laboratory Serology Division,* No. 93-Misc.-402 [190 W.Va. 321, 438 S.E.2d 501] (W.Va. Nov. 10, 1993) (not yet reported). The Court agrees with the general factfindings of the West Virginia Supreme Court concerning Zain's competence, abilities and reliability and finds that there is a significant danger that similar conduct occurred in Texas.

14. Zain was terminated from the Bexar County Forensic Science Center for mishandling of evidence and because of the result of Dr. Stone's audit.

B. Bill Reimer's Actions

1. Bill Reimer is the elected district attorney of Comal County, Texas.

2. Reimer, acting in his official capacity as district attorney of Comal County, personally prosecuted Applicant at his first trial.

3. Reimer has disqualified himself from further prosecution in this cause and Ray Taylor has been named special district attorney to prosecute Applicant and Taylor is completely independent of the Comal County District Attorney's Office.

4. The Court of Appeals has found that Reimer engaged in prosecutorial misconduct and suborned perjury. That finding is binding upon this Court and is accepted herein and that finding serves as a basis for this Court's conclusions of law. See generally, *Davis v. State,* 831 S.W.2d 426 (Tex.App.—Austin 1992, pet. ref'd).

5. Reimer presented the following facts to a jury in Applicant's trial:

a. Certain evidence was not tested because of the cost to Comal County. This statement was incorrect because Comal County only paid for Zain's testimony.

b. That the police investigation was excellently conducted and outstanding while before the trial he wrote New Braunfels city officials complaining of the lost evidence and negligence of the police investigation.

C. Irregularities Regarding the Evidence

1. The New Braunfels Police Department erased a tape recorded statement of Marci French made the night of the homicide.

2. Alda Hanus claims that Marci French on the night of the homicide said she saw a man going down the stairs of the apartment with long stringy hair wearing a white T-shirt and jeans while Marci French denies making the statement.

3. The description given by Aldo Hanus matches the description that Applicant gave of the person he saw leaving the victim's apartment.

4. Hairs found in the victim's hands were lost.

5. Blood samples taken from the victim's body were stored in such a manner that they were incapable of being used as known samples in scientific testing.

6. To provide "known samples" of the victim's blood, Zain selected certain blood stains from evidence and declared them to be the known samples of the victim's blood.

CONCLUSIONS OF LAW

1. Zain was a prosecution expert witness.

2. Applicant is not entitled to relief based upon the Double Jeopardy Clause of the Fifth Amendment. *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

3. Applicant is not entitled to relief based upon the Double Jeopardy provisions of Tex. Const. art. I, § 14.

4. Article I, § 14 provides no greater rights against double jeopardy than does the Fifth Amendment.

5. Applicant was not deprived of Due Process of Law as guaranteed by the Fourteenth Amendment, U.S. Const. amend. XIV.

6. Article I, §§ 13 and 19 provide no greater rights or protections than does the Fourteenth Amendment.

7. Applicant was not deprived of Due Course of Law as guaranteed by Tex. Const. art. I, §§ 13 and 19.

ORDER

It is ordered that the clerk of this Court prepare a supplemental transcript including these findings of facts and the order denying relief and that the clerk file the supplemental transcript with the clerk of the Court of Appeals in Austin, Texas, on or before December 15, 1993.

SIGNED AND ENTERED THIS 10TH DAY OF DECEMBER, 1993.

/s/ Charles R. Ramsay
JUDGE PRESIDING

APPENDIX E

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

September 11, 1996
COA#: 03-93-00646-CR
RE: Case No. 0495-95
STYLE: DAVIS, JACK WARREN

On this day, the Appellant's Petition for Discretionary Review has been GRANTED. An original and eleven copies of the Appellant's brief must be filed with this Court within 30 days. The State's brief is then due 30 days after the timely filing of the Appellant's brief.

GRANTED ON NO. 6 ONLY—ORAL ARGUMENT REQUESTED

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:
W TROY MCKINNEY
ATTORNEY AT LAW
ELEVEN GREENWAY PLAZA
SUITE 3112
HOUSTON TX 77046

APPENDIX F

Ex parte JACK WARREN DAVIS,

No. 495-95

[Tex. Crim. App. Sept. 17, 1997]

Petition for Discretionary Review From the Third Court of Appeals (Comal County)

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Applicant, Jack Warren Davis, was convicted of capital murder and sentenced to life in prison. The court of appeals reversed and remanded the cause to the trial court for a new trial. *Davis v. State ("Davis I")*, 831 S.W.2d 426 (Tex.App.-Austin 1992, pet. ref'd). Applicant subsequently filed a pretrial writ of habeas corpus, averring the double jeopardy clauses of the Texas and United States constitutions barred his retrial. The habeas court denied relief, and the court of appeals affirmed. *Ex parte Davis ("Davis II")*, 893 S.W. 2d 252 (Tex. App.-Austin 1995). This Court granted applicant's petition for discretionary review to consider the following ground for review:

Does the rationale of *Bauder v. State*, 921 S.W.2d 696 (Tex.Crim.App. 1996), barring a retrial on state double jeopardy grounds following the granting of a mistrial because of prosecutorial misconduct, apply when the cause goes to a verdict but is reversed on appeal?

At applicant's trial, Fred Zain testified for the State as an expert witness. He testified as to DNA tests he allegedly performed on blood and other evidence, testimony which was found by the court at the habeas hearing to be false. The habeas court also found that the testimony of Lt. Richards, another State witness, was probably inaccurate, as it was based on Zain's testimony. The habeas court concluded Zain's conduct was intentional, outrageous and shocked the conscience of the court.

The court of appeals, in reversing applicant's conviction *(Davis I)*, sustained applicant's contention the district attorney intimidated a witness, Toth, and, in effect, suborned perjury. Toth testified on direct examination she observed applicant and the victim's sister embrace shortly after the murder was discovered. The significance of this testimony is that it supported applicant's version as to how the victim's blood and saliva got onto applicant's vest (the victim's sister attempted to revive her by giving her CPR; while doing so blood from the victim's wounds stained the clothing she was wearing when she embraced applicant thus staining applicant's vest). On redirect examination she confirmed her earlier testimony as to the embrace.

The next day the State recalled Toth. She testified then that, on second thought, she did not actually see applicant and the victim's sister embrace. She testified she saw what she assumed was a just-concluded embrace. Defense counsel asked Toth if anyone had asked her to change her testimony or had threatened her if she did not do so; she said no one had done so.

Upon learning there had been contact between Toth and the district attorney after her testimony on the first day, applicant moved for a mistrial on the ground of prosecutorial misconduct. The trial court conducted an informal hearing outside the presence of the jury.

The district attorney told the court he reviewed statements by two police officers which said applicant had only come halfway up the stairs to the victim's apartment (Toth testified initially the embrace occurred at the top of the stairs). He also reviewed the sister's testimony that she did not embrace applicant. Subsequently, he asked a police officer to contact Toth and for her to call his office. Upon her arrival, he informed her there was a conflict between her testimony and that of other witnesses and that he would present the matter to the grand jury if he could not resolve the conflict. He said he would indict the officers if they had lied, "or the reverse if she had not told the truth." He told her he had already put one person in jail for lying on the stand last year. He finally asked her if she might have been mistaken about having seen a completed embrace; she said she had been mistaken.

The court then asked Toth, after granting her immunity from pros-

ecution for perjury and assuring her she was not going to jail, if she had changed her testimony in response to the threat from the district attorney to have her brought before the grand jury. She answered, under oath, "that's why I changed it." She also told the court the district attorney had frightened and intimidated her. The district attorney and an employee of his office, Filkins, who was present when Toth appeared at his office to discuss her trial testimony, both testified there was no berating or intimidation of Toth; he only expressed his interest in cleaning up the inconsistencies in the testimony of Toth and the police officers. The district attorney did testify he would take anyone involved who was lying to the grand jury.

After the hearing, the trial court ruled there had not been prosecutorial misconduct that would justify a mistrial. He did indicate he would instruct the jury not to consider Toth's second day of testimony for any purpose, which he subsequently did.

The court of appeals acknowledged "it is not improper per se for a trial court judge or prosecuting attorney to advise prospective witnesses of the penalties for testifying falsely." *Davis I, supra,* at 437, citing *United States v. Blackwell,* 694 F.2d 1325, 1334 (D.C. Cir. 1982). The court of appeals characterized the actions of the district attorney as having gone far beyond a cautious or judicious warning to Toth to tell the truth or risk a perjury charge, noting the meeting took place outside the presence of the trial judge. The court of appeals criticized strongly the district attorney for giving the jury the impression that it was *Toth* who first contacted him because she thought her initial testimony was misleading when the opposite was true. The court of appeals found this to be the knowing use of perjured testimony, found it to have denied applicant a fair trial and violated his due process rights, and held the trial court erred in denying applicant's motion for mistrial.[1]

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1. Given the importance of Toth's initial testimony and the taint resulting from the actions of the district attorney, the court of appeals *(Davis I)* found the instruction to the jury to disregard Toth's subsequent testimony insufficient. The court of appeals also sustained applicant's tenth point of error (application for warrant to take a sample of applicant's blood not supported by affidavit establishing probable cause; *see* Tex. Code Crim. Proc Art. 18.01) and his eleventh point of error (trial court erred in refusing to permit applicant an opportunity to impeach State witness Balonis as to bias or prejudice).

At the habeas hearing, the court's findings of fact noted: (1) certain key items of evidence were lost or mishandled, including hair and blood samples; (2) a taped statement of Marci French, made the night of the homicide, was erased by the police. French, a witness who testified at trial, did make a second taped statement the day after the homicide; (3) a second witness, Hanus, testified the two statements were contradictory as to French's description of the persons she observed leaving the victim's apartment the night of the crime; and (4) Zain committed aggravated perjury and tainted all of the evidence he handled.

The court of appeals, in affirming the denial of habeas relief, concluded "when a trial proceeds to conclusion despite a legitimate claim of serious prejudicial error and the conviction is reversed on appeal, retrial is not jeopardy-barred." *Davis II*, 893 S.W.2d at 254. *See Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192 (1896); *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075 (1976); *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970).

The Supreme Court has held on several occasions that the concept of "continuing jeopardy" is applicable where an individual has obtained a reversal of his conviction. That is because he was not denied his right under the double jeopardy clause to have the charges against him tried to a verdict before the first tribunal. Whereas, where a mistrial takes place, he is denied the opportunity to have the case decided by the first tribunal. Therefore, retrial after reversal of his conviction is not barred by the double jeopardy clause of the United States Constitution. *Price v. Georgia, supra; Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308, 104 S.Ct. 1805, 1813 (1984); *Montana v. Hall*, 481 U.S. 400, 402-403, 107 S.Ct. 1825, 1826 (1987).

> It is a venerable principle of double jeopardy jurisprudence that the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict (citation omitted), poses no bar to further prosecution on the same charge ...Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to

> pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Montana v. Hall, 109 S.Ct. at 1825, 1826; citing *United States v. Tateo,* 377 U.S. 463, 466, 84 S.Ct. 1587, 1589 (1964).

In general, double jeopardy "does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart v. Nelson,* 488 U.S. 33, 38, 109 S.Ct. 285 (1988). There are a few exceptions to this rule. For example, if a conviction is reversed because the evidence is legally insufficient to convict, retrial is barred because, for double jeopardy purposes, this is equivalent to a judgment of acquittal. *See United States v. Doyle,* 1997 WL 430026 at pg. 3 (7th Cir. 1997), citing *Lockhart v. Nelson,* 488 U.S. at 39.

It is clear applicant's retrial is not barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution.

We note initially that this Court, as well as the Texas Supreme Court, has held that the Texas Constitution gives greater protection in some instances to Texas citizens than does its federal counterpart. *Davenport v. Garcia,* 834 S.W.2d 4 (Tex. 1992); *Heitman v. State,* 815 S.W.2d 681 (Tex. Crim.App. 1991); *Autran v. State,* 887 S.W.2d 31 (Tex.Crim.App. 1994) (plurality op.). However, until recently, we have consistently held the Texas and United States constitutions' double jeopardy provisions provide substantially identical protections. *Phillips v. State,* 787 S.W.2d 391 (Tex.Crim.App. 1990); *Stephens v. State,* 806 S.W.2d 812 (Tex.Crim.App. 1990). Prior to our opinion in *Bauder, supra,* we have applied the standard

of review set forth by the United States Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083 (1982), to double jeopardy claims arising out of instances where mistrials were provoked by the State. *Crawford v. State*, 703 S.W.2d 655 (Tex.Crim.App. 1986); *Collins v. State*, 640 S.W.2d 288 (Tex.Crim.App. 1982) (panel op.); *Anderson v. State*, 635 S.W.2d 722 (Tex.Crim.App. 1982). The Supreme Court held the double jeopardy clause of the Fifth Amendment is not offended by a second prosecution for the same offense where the earlier proceeding was terminated by mistrial at the defendant's request unless the State deliberately set out to provoke the defendant's motion for mistrial. *Oregon v. Kennedy, supra.*

In *Bauder* we held that, under the Texas Constitution's double jeopardy clause, "a second prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only where the objectionable conduct of the prosecutor was intended to induce a motion for mistrial, but also when the prosecutor was aware but consciously disregarded the risk that an event for which he was responsible would require a mistrial at the defendant's request... He is accountable for mistrials properly granted by the trial judge when the events making a mistrial necessary were of his own deliberate or reckless doing." *Bauder, supra*, at 699.[2]

Bauder, however, is not dispositive with respect to the present case due to a most significant difference: applicant in the present case had his conviction reversed after a full trial on the merits whereas in *Bauder* applicant's trial was never completed (on two occasions) due to State-provoked mistrials. At least one federal appellate court has held that "[double jeopardy would bar retrial after reversal] only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the

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2. Several state supreme courts have explicitly adopted the *Oregon v. Kennedy* standard under their state constitutions. *Robinson v. Commonwealth*, 18 Va.App. 814, 447 S.E.2d 542 (1994); *Stamps v. Commonwealth*, 648 S.W.2d 868 (Ky. 1983); *State v. White*, 332 N.C. 506, 369 S.E.2d 813 (1988). The Pennsylvania Supreme Court's reasoning in *Commonwealth v. Smith*, 615 A.2d 521 (Pa. 1992) is similar to that of *Bauder*.

absence of his misconduct." *United States v. Wallach*, 979 F.2d 912, 916 (2nd Circ. 1992), *cert. denied*, 508 U.S. 939 (1993).[3] The Second Circuit noted that this standard embraced that set forth by the Supreme Court in *Oregon v. Kennedy* to bar retrial after a mistrial caused by egregious and intentional prosecutorial misconduct. Applicant has not directed us to any cases, however, where the Supreme Court has explicitly extended *Oregon v. Kennedy* to apply to instances where verdicts of guilty have been reversed on appeal due to prosecutorial misconduct, and therefore holding retrials as jeopardy-barred.

Applicant contends that, under *Bauder*, if mistrial had been granted in this case, retrial of applicant would have been barred. However, this is not the ground on which applicant's petition for discretionary review was granted; as noted earlier we granted review to consider whether the Texas Constitution's double jeopardy protections, as interpreted by this Court in *Bauder*, apply where an applicant has obtained a reversal of his conviction on appeal, due at least in part to prosecutorial misconduct at trial.

With respect to the testimony of Fred Zain, we note the habeas court did not make any findings of fact indicating the State knew, or should have known, Zain's testimony was false or perjured. Indeed, the habeas court found Zain *misled* Lt. Richards, a key State witness, regarding the forensic facts, thus causing Lt. Richards' testimony and conclusions to be probably inaccurate. While we are not bound by the findings of fact and conclusions of law of the habeas court, we generally defer to them if they are supported by the record, and, in this instance, find them to be reliable, supported by the record, and entitled to such deference. *Ex parte Turner*, 545 S.W.2d 470, 473 (Tex.Crim.App. 1977); *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex.Crim.App. 1989); *Ex parte Mowbray*, Tex.Crim.App., No. 72,624 (delivered Dec. 18, 1996). We hold that the State did not intentionally or recklessly cause applicant's trial to be tainted by Zain's perjured testimony or Lt. Richard's inaccurate testimony.

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3. *But see*, however, *United States v. Oseni*, 996 F.2d 186, 187-188 (7th Cir. 1993), in which the court specifically rejected the Second Circuit's holding in *Wallach*, extending *Oregon v. Kennedy* to bar retrial following a reversal due, in part, to prosecutorial misconduct.

The habeas court also found the police mishandled certain key items of physical evidence and also erased a tape recorded statement of Marci French that may have been exculpatory or otherwise may have been useful to applicant to impeach French. There is no question that applicant would have been entitled to access to the missing tape. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); *Kyles v. Whitley*, 115 S.Ct. 1555 (1995). The record does not support any assertion that the erasure of the tape or the mishandling of physical evidence was the result of intentional or reckless misconduct by the State. *Bauder* does not stand for the proposition that retrial is barred by the Double Jeopardy Clause of the Texas Constitution where a mistrial is granted due to the prosecutor's simple negligence or mere sloppiness. *Bauder* certainly does not forbid, on state constitutional jeopardy grounds, a retrial following a reversal on appeal. Furthermore, the sloppiness and negligence was on the part of the police; the proper remedy for such police actions that, in effect, denied applicant due process of law is retrial. *Brady v. Maryland, supra; Kyles v. Whitley, supra.*

The actions of the prosecutor in the present case were reprehensible. The habeas court found the prosecutor misled the jury as to why certain evidence was not tested and misled the jury as to the quality of the investigation conducted by the police (he told the jury it was excellent when he had, before trial, complained in writing about the lost evidence and negligence of the police department). As to his out-of-court conversation with witness Toth, while we find it was poorly and coercively handled, we do not agree with the court of appeals in *Davis I* that Toth was encouraged to perjure herself or otherwise misrepresent her observations to the jury. We are troubled by the false impression given to the jury that Toth approached the prosecutor out of concern that her initial testimony was potentially misleading when it was the prosecutor who approached her. Still, we are not persuaded that the actions of the prosecutor were so egregious as to bar the retrial of applicant on Texas constitutional double jeopardy grounds, as he has already been accorded the relief to which he was entitled: reversal of his conviction on appeal.

Applicant cites a recent decision of the New Mexico Supreme Court in support of his contention that the holding of *Bauder* be extended to cases involving prosecutorial misconduct where convictions have been reversed

on appeal (thereby barring retrial by the Texas Constitution's double jeopardy provisions). *State v. Breit,* No. 21,594 (N.Mex.) (delivered Dec. 6, 1996). In *Breit,* applicant's conviction was reversed, and, on double jeopardy grounds, the court ordered applicant discharged from any further prosecution in that cause.

The court emphasized that "when a trial is severely prejudiced by prosecutorial conduct, the double jeopardy analysis is identical, whether the defendant requests a mistrial, a new trial, or, on appeal, a reversal." *Breit, supra,* at 5. Yet, the court fails to cite any federal appellate court opinions or opinions of other state high courts[4] in support of its holding that double jeopardy principles are applicable where a defendant has obtained a reversal of his conviction on appeal due, at least in part, to prosecutorial misconduct during his first trial, thereby barring his retrial.[5]

What took place in the present case is, in may respects, similar to what we found to compel reversal on due process grounds in *Cook v State,* No. 71,855 (Tex.Crim.App.) (delivered Nov. 6, 1996). In *Cook,* we found prosecutorial misconduct, which included withholding of potentially exculpatory evidence,[6] combined with the false and misleading testimony of a state's expert witness concerning fingerprint evidence, violated applicant's

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4. The North Carolina Supreme Court did affirm the North Carolina Court of Appeals' holding that a retrial following reversal on appeal should be jeopardy-barred where the reversal was due to prosecutorial overreaching or harassment aimed at prejudicing the defendant's chances for acquittal, whether in the current trial or a retrial. *State v. White,* 354 S.E.2d 324, 329 (N.C.Ct.App. 1987), aff'd, 322 N.C. 506, 369 S.E.2d 813 (N.C. 1988).

5. The actions of the prosecutor in *Breit* were pervasively improper, intentional, and tainted nearly every phase of the trial, from opening statement to closing argument. *See Breit, supra, Appendix.* The prosecutorial misconduct in the present case, though significant, is by no means comparable to that which took place in *Breit.*

6. This evidence included evidence of misrepresentation of a deal between a convicted criminal and the State to testify (falsely, it turned out) against applicant, evidence pointing to another person as a viable suspect, and evidence concerning a key prosecution witness (Hoehne), which indicated he may have perjured himself.

rights under the Due Process Clause of the United States Constitution, as well as his rights under the due course of law provisions of the Texas Constitution (Art. I, Secs. 13 and 19). We declined, however, to accept applicant's contention the prosecution's misconduct was so egregious as to bar retrial on either state or federal double jeopardy grounds.

As the court of appeals noted, "in considering other cases where the facts and circumstances were fully as outrageous and shocking as those in this case, the Court of Criminal Appeals has ordered a retrial and not the dismissal of charges and an acquittal." *Davis II*, 893 S.W.2d at 257, citing *Ex parte Adams*, 768 S.W.2d 281 (Tex.Crim.App. 1989); *Ex parte Brandley*, 781 S.W.2d 886, 887 (Tex.Crim.App. 1989). We agree with the court of appeals that retrial, not dismissal of the charge and acquittal, is the proper remedy.

Fundamentally, this is a due process case. It has long been the law that where a defendant's due process rights have been violated to the extent that he has been denied a fair trial, the proper remedy is reversal of his conviction and remand of the cause to the trial court for further proceedings. *Brady v. Maryland, supra; Kyles v. Whitley, supra; United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). We decline applicant's invitation to extend our interpretation of the Texas Constitution's double jeopardy protections in *Bauder* to instances like the present case which involve due process concerns for which the well-established remedy of reversal is intended to address. *Bauder* applies only where a mistrial has been granted due to reckless or intentional prosecutorial misconduct; therefore it does not apply to the present case as no mistrial was granted and we further find no abuse of discretion on the part of the trial court in its denial of applicant's mistrial motion.

Accordingly, we decline to apply our holding in *Bauder* to instances, like the present case, to bar a retrial, on Texas constitutional double jeopardy grounds, where an applicant has had his conviction reversed on appeal due, at least in part, to prosecutorial misconduct.[7]

We affirm the judgment of the court of appeals.

MANSFIELD, J.

DELIVERED SEPTEMBER 17, 1997

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KELLER, J., CONCURS IN THE RESULT.

OVERSTREET, J., DISSENTS.

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7. The dissent fails to recognize the considerable adverse impact of a reversal of a conviction on the State. The State must decide whether or not to retry the cause, a decision often complicated by the passage of several years since the first trial, the possible loss of evidence over time and the fact that witnesses may no longer be available or their memories of the event may be less reliable, rendering their testimony less accurate. The cost to the State of a "second bite of the apple" is significant, financially and otherwise (indeed, the State often elects *not* to pursue a retrial following a reversal; *see*, e.g., *Ex parte Brandley, supra);* the dissent's implicit dismissal of this fact is troubling. Our holding in the present cause cannot be read as sanctioning prosecutorial misconduct, misconduct for which the well-established remedy of reversal was correctly applied in this case by the court of appeals. We should decline to create a new remedy, the expansion of *Bauder* to bar retrial on Texas constitutional grounds after reversal due to prosecutorial misconduct, where there is no compelling need to do so. The well-established remedy of reversal has not been demonstrated as being inadequate to deter prosecutorial misconduct so as to justify an extension of *Bauder.*

Finally, the evidence that the State intentionally acted in an improper manner at the first trial so as to avoid the risk of an acquittal is simply not supported by the record. Assuming, *arguendo,* there was no prosecutorial misconduct during appellant's trial, he does not persuade us the evidence was factually or legally insufficient to support a conviction, which would bar his retrial. *Lockhart v. Nelson, supra.*

JACK WARREN DAVIS, Appellant

NO. 495-95

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v.

THE STATE OF TEXAS, Appellee

Petition For Discretionary Review from the Third Court of Appeals (Comal County)

CONCURRING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

I join the majority opinion in this case. I write separately to respond to the philosophically judicial activist approach to constitutional interpretation advocated in the dissenting opinion.

The majority opinion adopts as a matter of state constitutional law the well-settled rule that is applied in almost every state and federal jurisdiction in this country: double jeopardy principles do not bar a reprosecution when a conviction is reversed on appeal for ordinary "trial error." This rule strikes a proper balance between the community's legitimate interest in fighting crime and a defendant's legitimate double jeopardy interests.

The dissenting opinion would adopt as a matter of state constitutional law a mostly unprecedented rule that double jeopardy principles bar a reprosecution when a conviction is reversed on appeal for what the dissenting opinion calls "prosecutorial misconduct." This rule would not be limited to just this case and these facts but would be applicable in every case where at least five judges on this Court believed "prosecutorial misconduct" occurred. This is an awesome power the dissenting opinion advocates the judiciary should reserve for itself especially when one considers that most

times "prosecutorial misconduct" is not so easily defined.[1] For example, the author of the dissenting opinion has taken the position that "prosecutorial misconduct" occurs and factually and legally guilty criminals walk free even when the prosecution does not intend to engage in misconduct and makes an honest mistake. See *Bauder v. State*, 921 S.W.2d 701-02 (Tex. Cr.App.1996) (Baird, J., concurring) (prosecutors are "responsible" for their "misconduct" without regard for their *mens rea*).[2]

Our citizens have other remedies aside from judicially imposed rules for dealing with "prosecutorial misconduct." See *Bauder*, 921 S.W.2d at 706 fn5 (McCormick, P.J., dissenting). Absent clear intent to the contrary in Texas' constitutional double jeopardy provisions, our duty is to leave the remedy for "prosecutorial misconduct" to the legislative and political processes for the citizens to decide.

Most questions of constitutional interpretation involve giving effect to the intent of the voters who adopted the constitutional provision at issue. See *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 (Tex.Cr.App. 1993); *Bauder*, 921 S.W.2d at 708 (McCormick, P.J., dissenting). This means the judiciary when interpreting the Constitution has no power to legislate its own policy preferences behind the Legislature's back. Se *Bauder*, 921 S.W.2d at 705-08 (McCormick, P.J., dissenting). Questions of constitutional interpretation often involve a delicate process of balancing the interests of the community and the interests of the individual. See *Bauder*, 921 S.W.2d at 705-08 (McCormick, P.J., dissenting).

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1. This concurring opinion addresses "prosecutorial misconduct" in general and not the particular conduct in this case. This case does not present the issue of whether "prosecutorial misconduct" occurred, so it is unnecessary to engage in a feel-good and pointless exercise of "openly condemning" the conduct that occurred in this case as footnote seven of the dissent would have us do.

2. Of course, the position taken by this author in *Bauder* garnered only one vote and, therefore, does not constitute the law of this State even though the author of the dissenting opinion attempted to pass his concurring opinion in *Bauder* off as the majority holding of the Court. See *Bauder*, 921 S.W.2d at 701-02 (Baird, J., concurring) (one-judge plurality opinion with no precedential value).

When the dissenting opinion speaks of "breathing life" into our Constitution by effectively interpreting it to provide "more protection" to criminals, the community's interest in protecting ourselves from dangerous criminals also suffers. See *Bauder*, 921 S.W.2d at 703 fn 2 (McCormick, P.J., dissenting). Interpreting our Constitution to provide "more protection" to criminals also necessarily puts "more restrictions" on the community's efforts to combat crime. If we are to interpret our Constitution effectively to provide "more protection" to criminals, then the constitutional provision at issue should clearly require us to do so.

Texas' double jeopardy clause contains a simple command or prohibition. The "plain" language and history of this clause indicates it was intended to bar a reprosecution when a case has proceeded to a final verdict of guilty or acquittal.[3] See *Bauder*, 921 S.W.2d at 706 fn 5 (McCormick, P.J., dissenting). Texas' double jeopardy clause actually provides "less protection" than that provided by its federal counterpart, at least as interpreted by the Supreme Court. See *Bauder*, 921 S.W.2d at 706 fn 5 (McCormick, P.J., dissenting). This also applies to other Texas constitutional provisions. See *Heitman v. State: The Question Left Unanswered*, 23 St. Mary's L.J. at 956-74. This interpretation of Texas' double jeopardy provision strikes a proper balance between the competing interests.

Completely absent from the approach to constitutional interpretation in the dissenting opinion is any consideration of the legitimate interests of the community or any sense of judicial restraint. See *Autran v. State*, 887 S.W.2d 43-49 (Tex.Cr.App. 1994) (McCormick, P.J., dissenting). When the reader strips away the dissenting opinion's rhetorical flourish and its discussion of out-of-state cases that have little, if anything, to do with interpreting our Constitution, the reader should realize that the author of the dissenting opinion is attempting to legislate his own policy preferences under the guise of constitutional interpretation. This approach has less to do with interpreting the Constitution and more to do with legislating behind the Legislature's back.

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3. When a case is reversed on appeal for ordinary "trial error," the case has not proceeded to a final verdict.

Finally, the dissenting opinion seems enamored with Justice Brennan's approach to constitutional interpretation. I would not adopt Justice Brennan's brand of judicial activism for interpreting our Constitution. Such an approach has never heard of judicial restraint, knows no bounds to the limits of judicial power and shows no respect to the legislative process or to the legitimate interests of law-abiding citizens. See Jeff Jacoby, *Justice Brennan's Legacy: An Imperious Judiciary;* The Houston Chronicle (for over 34 years on the bench, Justice Brennan "repeatedly shoved aside text and precedent, trampling the rights of citizens and legislatures in order to chisel his own notions of justice into American law" with his chief legacy being "his judicial authoritarianism: his assertion that in any political controversy, judges have the last word – not voters, not lawmakers, not elected representatives").[4]

With these comments, I join the majority opinion's exercise in judicial restraint.

McCormick, Presiding Judge

(Delivered September 17, 1997)
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4. The author of the dissenting opinion has labeled this discussion as an "*ad hominem*" or personal attack on the late Justice Brennan. It is not. What it is is a discussion of my perception of the role of the judiciary and a criticism of those who serve on high courts and attempt to wield the philosophical sword of judicial activism.

JACK WARREN DAVIS,
Appellant

NO. 495-95

v.

THE STATE OF TEXAS
Appellee

Petition for Discretionary Review from the Third Court of Appeals
[Comal County]

CONCURRING OPINION

Appellant claims the prosecutor engaged in misconduct sufficiently egregious to have warranted the granting of his motion for a mistrial and a consequential jeopardy bar to retrial. Even though his mistrial motion was not granted and the trial proceeded to verdict, appellant says retrial should be barred because it would have been barred if the trial court had ruled properly and granted his mistrial motion instead of erroneously denying it. The Court of Appeals held that when a trial court proceeds to a verdict despite a legitimate claim of serious prosecutorial misconduct and the conviction is reversed on appeal due to the misconduct, retrial is not jeopardy barred. *Ex parte Davis*, 893 S.W.2d 252 (Tex.App.-Austin 1995). We granted review to decide whether the Court of Appeals erred in this holding.

It is not altogether clear on what basis the majority resolves this case. A great deal, if not most, of the Court's opinion is devoted to re-analyzing whether the prosecutor's actions were sufficiently reprehensible to have warranted the granting of appellant's motion for mistrial under *Bauder v. State*, 921 S.W.2d 696 (Tex.Crim.App.1996). That is not the ground upon which we granted review, however.[1] The Court's opinion contains some mention of double jeopardy principles and their application in the

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1. Even the other concurring opinion recognizes that "this case does not present the issue of whether 'prosecutorial misconduct' occurred." *McCormick, P.J., concurring* at 2, n.2.

mistrial context, but there does not appear to be any analysis upon which the Court's holding decisively rests.

We fail the bench and bar in our role as a discretionary review court when we avoid directly grappling with the legal question presented in favor of resolving the case on its facts. This said, I will briefly outline the rationale which I believe supports the Court's judgment today. The question upon which the parties have turned to this Court for guidance is whether a defendant is entitled to have retrial jeopardy barred after an appellate court determines that his motion for mistrial based on prosecutorial misconduct (whether it be misconduct repugnant to *Kennedy, supra,* or *Bauder v. State,* 921 S.W.2d 696 (Tex.Crim.App.1996)) was erroneously denied.

Analysis should begin with *Kennedy.* There the Supreme Court, albeit in dicta, assumed that double jeopardy would not bar retrial upon an appellate determination that the trial court erroneously denied the defendant's motion for mistrial based on prosecutorial misconduct:

> Were we to embrace the broad and somewhat amorphous standard adopted by the Oregon Court of Appeals, we are not sure that criminal defendants as a class would be aided. Knowing that the granting of the defendant's motion for mistrial would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might well be loath to grant a defendant's motion for mistrial. *If a mistrial were in fact warranted under the applicable law, of course, the defendant could in many instances successfully appeal a judgment of conviction on the same ground that he urged a mistrial, and the Double Jeopardy Clause would present no bar to retrial.*

Kennedy, 456 U.S. at 676 (footnotes omitted) (emphasis added). In a footnote to these comments, the Court further noted that it had consistently held there is no jeopardy bar to retrial when a defendant has been successful in getting a court to set his conviction aside unless it is reversed for insufficient evidence. Four judges in concurrence, referred to the majority's assumption that an appellate court "would not be obligated to bar reprosecution as well as reverse the conviction" as "irrational." *Id.* at 688 n.22 (Stevens, J., con-

curring, joined by Brennan, Marshall, and Blackmun, J.J.). The question is why would a majority of the Supreme Court consider jeopardy no bar to retrial after an appellate determination that a mistrial should have been granted for prosecutorial misconduct, while four other judges view that position as "irrational." As is often the case in law, there are persuasive arguments on both sides of the matter.

Several Courts have set forth the competing sides of this issue, roughly reflecting the arguments presented by the parties in this case. The 8th Circuit Court of Appeals addressed the issue with clarity in *United States v. Singer,* 785 F.2d 228 (8th Cir.), *cert. denied,* 479 U.S. 883 (1986):

> There is good reason to argue that a criminal defendant whose conviction over a timely motion for mistrial is reversed because of any sort of governmental misconduct should be placed on equal footing with a defendant whose motion properly is granted. The defendant obtains mistrial only if the trial judge apprehends the sufficiently prejudicial misconduct. In reversing, the appellate court simply corrects the trial court's error. The right of a criminal defendant not to be twice placed in jeopardy should not hang on which court correctly determines that misconduct infected the trial. As the Supreme Court stated in *United States v. Burks,* [437 U.S. 1], when explaining why double jeopardy concerns preclude retrial upon reversal for insufficient evidence, "[T]o hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court."
>
> But there is danger in drawing too much from *Burks'* grudging exception. Indeed, in *Burks* itself, the Court stated that governmental misconduct was not among the grounds for reversal that implicated the double jeopardy clause. And as the Court added in *Oregon v. Kennedy:* "This Court has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of insufficiency of the evidence." If the bedrock

> interest supporting the double jeopardy prohibition is protection of the defendant's "valued right" to have a verdict rendered by the first jury, then the dangers which the prohibition seeks to avoid are more attenuated when the first trial goes to verdict, since the defendant has not lost his chance for acquittal by the first jury. Thus it can persuasively be argued that the double jeopardy clause should not be read to impose the drastic remedy of dismissal of the indictment following reversal of a conviction on the basis of misconduct.

Id. at 239-40 (citations omitted). Both sides of the issue have also been well articulated by the Fifth Circuit Court of Appeals:

> ...When a defendant moves for a mistrial because of a prosecutor's misconduct . . ., an appellate reversal based on that same misconduct seems equivalent to a determination that the district court erred in ruling on the mistrial motion. It seems anomalous to say that identical prosecutorial misconduct will create a constitutional bar to retrial when the district court correctly grants a mistrial but not when the district court erroneously denies the mistrial request.
>
> On the other hand, under *Kennedy* the double jeopardy clause is concerned only with prosecutorial misconduct that is intended to provoke a mistrial. When a mistrial is not declared, then the prosecutor's efforts have been unsuccessful. The dangers that the *Kennedy* exception was intended to prevent–that the defendant might lose his "valued right to complete his trial before the first jury." and that the prosecutor might be seeking a more favorable opportunity to convict–are more attenuated when the defendant is convicted by the first jury but an appellate court reverses for prosecutorial misconduct. In such a case, the defendant has not lost his chance for an acquittal by the first jury, and it seems unlikely that any prosecutor would intentionally lay a basis for appellate reversal in order "to subvert the protections afforded by the Double Jeopardy Clause."

United States v. Singleterry, 683 F.2d 122, 124 (5th Cir.), *cert denied*, 459 U.S. 1021 (1982).

To summarize, the argument in support of allowing a jeopardy bar after an appellate determination is based largely on the idea that a defendant's jeopardy rights should not turn upon which court makes the determination that the government's misconduct infected the proceedings. The argument in opposition to permitting a jeopardy bar after an appellate determination looks beyond the government conduct to the actual fruition of that action. In my view, the later position, while it may seem unfair, is more consistent with the purposes underlying the double jeopardy bar in *Kennedy* and *Bauder* situations.

The Double Jeopardy Clause protects a defendant against multiple prosecutions for the same offense. In the mistrial context the Supreme Court has recognized that as part of the prohibition against multiple prosecutions, the Double Jeopardy Clause affords a defendant "the valued right to have his trial completed by a particular tribunal." *Kennedy*, 456 U.S. at 671-72 (quoting *Wade v. Hunter*, 336 U.S. 684, 869 (1949)). This right lies at the heart of the narrow exception[2] permitting a jeopardy bar where a mistrial was granted pursuant to the defendant's motion based upon prosecutorial misconduct of the nature discussed in *Kennedy* (or under the Texas Constitution, *Bauder*). In *Bauder*, we emphasized the right that is lost when a mistrial is granted as a result of prosecutorial misconduct, stating, "When this happens, we think the government should bear responsibility for denying the defendant his right, secured by the Texas Double Jeopardy Clause,

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2. After a verdict is rendered, whether a conviction or acquittal, the State cannot reprosecute for the same offense. The same is not true when the defendant has sought and received a reversal of his conviction (unless the reversal is based upon insufficient evidence under *Burks*). In these circumstances, the State can retry the defendant. When trial is aborted prior to a verdict pursuant to a mistrial over the defendant's objection, double jeopardy does not bar retrial as long as the mistrial was justified by "manifest necessity." When the mistrial is granted at the defendant's request, however, double jeopardy generally will not bar retrial. The one narrow exception to this rule was fashioned by the Supreme Court in *Kennedy* and, under the Texas Constitution by this Court in *Bauder*–when the mistrial motion granted at the defendant's request is based upon prosecutorial misconduct that was intended to induce a mistrial or when the prosecutor was aware but conscientiously disregarded the risk that this conduct would compel the defendant to request a mistrial.

to be tried in a single proceeding by the jury first selected." *Bauder*, 921 S.W.2d at 699 (emphasis added). When the State's conduct does not in fact invoke the mistrial, then the defendant gets his right to be tried in a single proceeding by the jury first selected, although admittedly the proceeding has been tainted. Once a proceeding to verdict has occurred, a defendant's double jeopardy rights are not implicated by a mistrial situation.[3] There has not been a mistrial. The fact that there *should* have been a mistrial is trial error that the defendant can raise on appeal, to which jeopardy principles do not apply.

We addressed this issue over fifteen years ago in *Durrough v. State*, 620 S.W.2d 134 (Tex.Crim.App.1981), there rejecting the defendant's claim that his retrial should be barred by double jeopardy because of prosecutorial misconduct in an earlier trial:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrials so as to afford the prosecution a more favorable opportunity to convict the defendant. [4] But when the trial proceeds to its conclusion despite a legitimate claim of serious prejudicial error, the Double Jeopardy Clause will present no obstacle to a retrial if the conviction is reversed on appeal. In the present case the alleged misconduct did not result in a mistrial. The appellant was found guilty of capital murder and sentenced to death. That judgment was reversed on

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3. The State suggests in its brief, however, that evidence tainted by the prosecutorial misconduct should not be admitted on retrial. I would be inclined, however, to leave this for the trial court to address when raised by the parties on retrial. *See Cook v. State*, 940 S.W. 2d 623, 628 (Tex.Crim.App.1996) (plurality opinion) (stating that evidence tainted by prosecutorial misconduct in first trial not admissible on retrial based on due process and fundamental fairness).

4. For this proposition, we cited *United States v. Dinitz*, 424 U.S. 600, 611 (1976), a pre-*Kennedy* opinion in which the Supreme Court stated, "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions."

> appeal and the case was remanded for a new trial. We reject appellant's contention that the alleged misconduct was a bar to further prosecution in this case.

(citations omitted).

Appellant's argument focuses on the nature of the government's conduct alone, rather than the circumstances provoked by the conduct. If conduct alone were at issue, the further question would be whether appellant need request a mistrial at all. But it is the circumstances arising from the government misconduct that justify a jeopardy bar under *Kennedy* and *Bauder*–it is the fact that the government misconduct leads to the granting of a mistrial and consequential denial of the defendant's right to have that jury render a verdict, that justifies the narrow exception to the rule that jeopardy does not bar retrial when mistrial arises from a defendant's motion.

I recognize that this view would place no small amount of responsibility on trial judges to conscientiously consider and rule on motions for mistrials based on prosecutorial misconduct under *Kennedy* or *Bauder*. But trial courts are better positioned than appellate courts to determine when circumstances cry out for a mistrial. I would trust trial courts to grant mistrials when required under the law irrespective of the jeopardy implications, knowing that a jeopardy bar would not be imposed if the mistrial were denied and such denial was found to be in error by an appellate court.[5]

For these reasons, I concur in the judgment of the Court.

MEYERS, J.

Delivered September 17, 1997
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5. A trial court's granting of a mistrial under *Kennedy* or *Bauder*, is not necessarily unreviewable. The State may seek to retry the defendant, whereupon the defendant may assert a claim of double jeopardy. The State can appeal from a determination that jeopardy lies. *See* Tex. Code Crim. Proc. Ann. art. 44.01 (a) (4) (state can appeal from order sustaining claim of former jeopardy.).

EX PARTE JACK WARREN DAVIS

NO. 495-95

Petition for Discretionary Review from the Third Court of Appeals
[Comal County]

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

In the criminal justice system, the prosecutor "is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, he must place foremost in his hierarchy of interests the determination of truth." *United States v. Bagley*, 473 U.S. 667, 696, 105 S.Ct. 3375, 3391 (1985) (Brennan, J., dissenting). Believing art. I. § 9 of the Texas Constitution bars retrial following the erroneous denial of a motion for mistrial based on prosecutorial misconduct, I dissent.

I.
Texas and Federal Double Jeopardy
A.

Art. I, § 9 of the Texas Constitution guarantees "[n]o person, for the same offense shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." Similarly, the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." These guarantees protect criminal defendants against a second prosecution for the same offense after an acquittal, against a second prosecution for the same offense after a conviction, and against multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897 (1989). The basis of these safeguards is the belief that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223 (1957).

B.

An integral protection of the Double Jeopardy Clause is the bar to retrial after a mistrial due to prosecutorial misconduct. In *United States v. Dintz*, 424 U.S. 600, 606-607, 96 S.Ct. 1075, 1079 (1976), the Supreme Court stated:

> ...Where ... a mistrial has been declared, the defendant's "valued right to have his trial completed by a particular tribunal" is also implicated. Since Mr. Justice Story's 1824 opinion for the court in *United States v. Perez*, 9 Wheat. 579, 580, 6 L.Ed. 165, this Court has held that the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on whether "there is a manifest necessity for the [mistrial], or the end of public justice would otherwise be defeated." (Internal citations omitted.)

The Court made the distinction between the defendant's request for a mistrial and the *sua sponte* granting of one by the trial judge. Even with error, the defendant has the choice of proceeding to verdict with the first jury, unless the defense requests the mistrial. In explaining why misconduct invokes the guarantee of the Fifth Amendment the Court stated:

> ... But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. *In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause - the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.*[1]

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1. All emphasis supplied unless otherwise indicated.

Id., 424 U.S. at 608, 96 S.Ct. at 1080. Because of the absolute and right and significant interest for having the first jury decide the case for the defendant, the Double Jeopardy Clause protects defendants from prosecutorial misconduct which results in a mistrial. *Id.*

In *Oregon v. Kennedy*, 456 U.S. 667, 675-676, 102 S.Ct. 2083, 2089 (1982), the Court re-examined *Dintz*, holding, "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Claluse." Consequently, when the mistrial was granted as a result of prosecutorial misconduct intended to goad the defendant into seeking a mistrial, retrial is barred under the Fifth Amendment.

However, the Texas Constitution provides protections greater than *Kennedy*. *Bauder v. State*, 921 S.W.2d 696 (Tex.Cr.App 1996). The *Bauder* Court held, "a successive prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only when the objectionable conduct of the prosecutor was intended to induce a motion for mistrial, but also when the prosecutor was aware of but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request." *Id.*, at 699. The *Kennedy* Court required an understanding of the scienter of the prosecution, while the *Bauder* Court held conduct which recklessly results in a mistrial will bar retrial. In other words, under the Texas Constitution, there is no distinction between intentionally and recklessly forcing a defendant to request a mistrial.

The issue in this case is whether the Double Jeopardy Clause of the Texas Constitution bars retrial following the erroneous denial of a mistrial based upon prosecutorial misconduct.[2]

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2. The concurring opinion argues adoption of this opinion would create a "broad rule" that would jeopardy bar *all* cases where the conviction was reversed as a result of prosecutorial misconduct. *Ante*, at___; slip op.pg.1 (McCormick, P.J., concurring). This is not true. This opinion is *limited* to the issue presented, namely whether art. I, § 9 of the Texas Constitution bars retrial when the trial judge *erroneously denies a mistrial based on prosecutorial misconduct.*

II.
Other Jurisdictions
A.
State

In *Pennsylvania v. Smith*, 615 A.2d 321 (Pa. 1992), the Pennsylvania Supreme Court held under the Pennsylvania Constitution, prosecutorial misconduct directed at securing a conviction is a possible double jeopardy bar to retrial. In *Smith*, the prosecution withheld potentially exculpatory physical evidence and denied the existence of an agreement with the State's chief witness, whereby the witness would receive favorable sentencing treatment for testifying against Smith. *Id.*, at 322. The reasoning of the Court rested on the egregiousness and bad faith on the part of the prosecution which "violate[d] all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause." *Id.*, at 324. Citing their own case, the Court stated their standard:

> The United States Supreme Court has enunciated principally two types of prosecutorial overreaching. First there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps more favorable, opportunity to convict the defendant. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. *It signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against.*

Id., at 324 (citing *Commonwealth v. Starks*, 490 Pa. 336, 341, 416 A.2d 498, 500 (1980)). The reasoned holding of the Court was "the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, *but also when the conduct of the prosecutor is intentionally, undertaken to prejudice the defendant to the point of the denial of a fair trial.*" *Id.*, at 325.

In New Mexico, the Supreme Court has adopted a test which is not dependent upon when the prosecutorial misconduct is discovered. Their test is "when a defendant moves for mistrial, retrial, or reversal because of prosecutorial misconduct, retrial is barred under Article II, Section 15 of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial or reversal." *New Mexico v. Breit,*, 930 P.2d 792, 803 (N.M. 1996). In coming to this decision, the *Breit* Court relied upon the memorandum decision of the trial court. The prosecutor made several egregious remarks during the trial and the trial court granted Breit's motion to dismiss further prosecution upon double jeopardy grounds. The trial judge discussed the role of the prosecution by quoting *Berger v. United States,*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. *It is as much his duty, to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

Breit,, 930 P.2d at 807.[3]

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3. The majority states the prosecutorial misconduct in the case *sub judice*, "while significant, is by no means comparable to that which took place in *Breit*." *Ante*, at____; slip op. pg. 10, n. 4. I disagree. While the prosecution in *Breit* made numerous egregious remarks throughout the trial, appellant has suffered from a lying district attorney, forced perjury, false physical evidence and destruction of exculpating evidence. It is far easier to defend against open assault than covert falsehoods and manipulations.

In Connecticut, the Superior Court established the following test to determine whether retrial was barred. The defendant must prove "the state engaged in prosecutorial misconduct 'undertaken with the deliberate purpose of depriving the defendant of double jeopardy's shield, that is to say, only a high-handed wrong intentionally directed against the defendant's constitutional right will trigger his right not to be twice put in jeopardy for the same offense.'" *Connecticut v. Colton,* 1997 WL 219996, 1 (Conn.Super.Ct. 1997) (citing *Colton II,*, 663 A.2d at 339). The Court stated the defendant must also prove that "the misconduct of the prosecutor is undertaken not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Id.* The rationale of the court emphasized few cases would meet the standard, however they held:

> We can see no principled justification for a distinction between prosecutorial misconduct that is clandestine, and therefore not discoverable until after a verdict or on appeal, and prosecutorial misconduct that is visible, and so can be remedied by a motion for mistrial or on direct appeal.

Connecticut v. Colton (Colton II), 663 A.2d 339, 347 (Conn. 1995).

In Nevada, the Court ruled double jeopardy would bar retrial in "cases in which the motion for retrial was denied and the judgment was subsequently reversed because of the prosecutorial misconduct which precipitated the motion for mistrial." *Collier v. Nevada,* 747 P.2d 225, 226 (Nev. 1987).

B.
Federal

The Fifth Circuit considered the implication of retrial after reversal based upon prosecutorial misconduct. *Robinson v. Wade,* 686 F.2d 298, 307 (5th Cir. 1982). The Court discussed the "unjustness of ... preclusive effect simply by the point in the judicial process at which a charge of overreaching is found meritorious." *Id.*, 686 F.2d at 307. The Court went on to make a distinction between the holding in *Burks, supra,* the problem with prosecutorial misconduct:

> Nor is the rationale of *Burks* inconsistent with application of the "prosecutorial overreaching" exception to bar retrial where the overreaching caused a tainted verdict to be set aside, rather than a tainted proceeding to be aborted. *Burks* ' holding, resting on a perceived dichotomy between reversals for evidentiary insufficiency, indicated that, as the former hold no implication for the guilt or innocence of the defendant, they would raise no bar to future prosecution. *Burks*, 98 S.Ct. at 2149. That distinction does not necessarily hold true where trial error is attributable to intentional prosecutorial overreaching. The extreme tactics which constitute prosecutorial overreaching offend the double jeopardy clause at least in part because they unfairly deprive the defendant of possible acquittal, by heightening, in a manner condemned by law, the jury's perception of the defendant's guilt.... *Whether the tactic condemned is successful in its objective of securing a mistrial. or unsuccessful. but causes the return of a verdict of conviction, would seem to be of little significance in development of a law of preclusion designed to protect this interest.*

Robinson, 686 F.2d at 308.[4]

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4. In an earlier opinion, the Fifth Circuit considered the issue of barring retrial after reversal for prosecutorial misconduct and determined, "[t]he argument has some support in logic." *United States v. Opager*. 616 F.2d 231,235 (5th Cir. 1980). However, the *Opager* Court ultimately determined no prosecutorial misconduct had occurred, so the issue was left for another day. An interesting footnote by Judge Gewin stated: "In sum, *Burks* may be read to not completely foreclose the application of the double jeopardy clause to cases in which reversal after conviction has been obtained where *Kessler* type bad faith overreaching exists." *Id.*, at 236, n. 13.

In *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976), the Court:

> found that intentional misconduct by the government in presenting false evidence to the court seriously prejudiced the defendant and held that "such intentional misconduct is 'prosecutorial overreaching' and is one of the 'types of oppressive practices at which the double jeopardy prohibition is aimed.'" *Opager*, 616 F.2d at 234 (citing *Kessler*, 530 F.2d at 1257-58, quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949)).

(continued...)

In dicta, the Second Circuit has suggested the Double Jeopardy Clause would bar retrial if the prosecutorial misconduct was undertaken with the intent of preventing an acquittal the prosecutor reasonably believed, at that time, was likely absent such misconduct. *United States v. Wallach*, 979 F.2d 912, 916 (2nd Cir. 1992). Their rationale compellingly argued for an extension of *Kennedy:*

> ...If jeopardy bars a retrial where a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion by the defendant, there is a plausible argument that the same result should obtain where he does so with the intent to avoid an acquittal he then believes is likely. The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, *a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction.*

4.(...continued) The Fifth Circuit also made a distinction between "prosecutorial misconduct" and "bad faith prosecutorial overreaching," preferring the overreaching phrase as connotative of the bad intent of the prosecution versus merely unintentional misconduct. *Id.*, at 236, n. 13. In this Court we have simultaneously used both terms with no distinction in their meaning. *See, Penry v. State*, 903 S.W.2d 715 (Tex.Cr.App. 1995); *Higginbotham v. State*, 807 S.W.2d 732 (Tex.Cr.App. 1991); *State v. Yount*, 853 S.W.2d 6 (Tex.Cr.App. 1993); *State v. Frye*, 897 S.W.2d 324 (Tex.Cr.App. 1995); *Cook v. State*, 940 S.W.2d 623 (Tex.Cr.App. 1996); and *Bauder v. State, supra.*

Id., at 916.[5]

In *United States v. Rios*, 37 F.2d 728, 729 (10th Cir. 1980), the Court held "that double jeopardy considerations applicable after a mistrial has been granted are indeed applicable in the same manner when prosecutorial misconduct requires reversal of a conviction for lack of a fair trial after a mistrial motion has been denied." The Court denied Rios' appeal, however, because the Court ruled the prosecution did not intend to provoke the defense into seeking a mistrial. Again, the scienter of the prosecution was seen as paramount in determining whether or not jeopardy bars retrial. In dissent, Judge McKay vehemently argued against this scienter standard, stating, "[t]o suggest that the double jeopardy clause is not violated unless the defendant can show (presumably only through the prosecutor's confession) that the subjective purpose of the prosecutor was to obtain a mistrial invites the prosecution to go as far as it wishes, knowing that the only sanction it faces is a new trial." *Id.*, at 731.

The Third Circuit expressly held double jeopardy would bar retrial upon reversal for prosecutorial misconduct, however, only in very narrow circumstances. *United States v. Curtis*, 683 F.2d 769, 776 (3rd Cir. 1982). In reaching their decision, the *Curtis* Court discussed Justice Stevens' con-

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5. The majority has referred to *United States v. Oseni*, 996 F.2d 186 (7th Cir. 1993), *ante*, at___; slip op. pg. 7, n. 3, for the proposition that the 7th Circuit has "specifically rejected the Second Circuit's holding in *Wallach.*" The majority also cites *United States v. Doyle*, 1997 WL 430026 (7th Cir. 1997), regarding the bar to retrial after reversal for insufficient evidence. *Ante*, at____; slip op. pg. 5. However, in *Doyle*, the 7th Circuit made specific comments regarding their holding in *Oseni* which the majority has failed to acknowledge:

> ... First, our case law impliedly suggests that this Circuit does not subscribe a Wallach-type extension of Kennedy. See *United States v. Oseni*, 996 F.2d 186, 187-88 (7th Cir. 1993). Second, although today *we do not decide whether we would adopt the Wallach exception* under other circumstances, Doyle does not, nor can he, show how he could meet the Kennedy or the Wallach exception to the traditional double jeopardy analysis, even if either case were to apply... *We expressly reserve the question of whether Wallach would apply in other circumstances.*.

Doyle, at 6, 9.

currence in *Kennedy* and his obvious problem with allowing retrial after appellate reversal:

> ... Justice Stevens, who was joined by three other Justices, also observed that the plurality's reasoning was "premised on the assumption that an appellate court that concluded not only that the defendant's mistrial motion should have been granted but also that the prosecutor intended to provoke a mistrial would not be obligated to bar reprosecution as well as reverse the conviction." Justice Stevens termed such an assumption "irrational."

Curtis, 683 F.2d at 774 (citing *Kennedy*, 102 S.Ct. 2095, n. 22). Even in consideration of *Burks* '"apparently preclusive language," *Curtis*, 683 F.2d at 776, the Court held "the double jeopardy clause should not be read to forbid a retrial following an appellate reversal for prosecutorial misconduct if a retrial would be barred." *Ibid.*

In *United States v, Singer*, 785 F.2d 228, 240 (1986), the Eighth Circuit, in a case of first impression, discussed at length the double jeopardy issue in a case they ultimately determined did not implicate jeopardy concerns. However unwilling the Court was to address the issue of whether jeopardy barred retrial after reversal for appellate misconduct, in dicta, they discussed their rationale:

> There is good reason to argue that a criminal defendant whose conviction over a timely motion for mistrial is reversed because of any sort of governmental misconduct should be placed on equal footing with a defendant whose motion was properly granted. The defendant obtains mistrial only if the trial judge apprehends the sufficiently prejudicial misconduct. In reversing, the appellate court simply corrects the trial court's error. *The right of a criminal defendant not to be twice placed in jeopardy should not hang on which court correctly determines that misconduct infected the trial.*

Id., at 239.[6]

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6. The concurring opinion refers to the cases discussed in this section as representing a "mostly unprecedented rule." *Ante* at____; slip op. pg. 1(McCormick, P. J. concurring). However, to support that position, the concurring judge cites only his

IV.
Facts

The State sought the death penalty in this case. Appellant was convicted of capital murder and ultimately sentenced to life in prison. His conviction was reversed by the Court of Appeals and a new trial was ordered. *Davis v. State* (Davis I), 831 S.W.2d 426 (Tex.App.—Austin 1992). Appellant filed a pretrial writ of habeas corpus alleging retrial was barred by the Double Jeopardy Clause of the Texas Constitution. Relief was denied by the trial court and the Court of Appeals. *Ex parte Davis* (Davis II), 893 S.W.2d 252 (Tex.App.– Austin 1995). We granted review to determine whether art. I, § 9 of the Texas Constitution bars retrial following the erroneous denial of a motion for mistrial based on prosecutorial misconduct.

The majority opinion has laid out the relevant facts. Important are the habeas court's findings of fact and conclusions of law regarding the actions of Bill Reimer, the Comal County District Attorney. The court's findings were:

1. Bill Reimer is the elected district attorney of Comal County, Texas.
2. Reimer, acting in his official capacity as district attorney of Comal County, personally prosecuted Applicant at his first trial.
3. Reimer has disqualified himself from further prosecution in this cause and Ray Taylor has been named special district attorney to prosecute Applicant and Taylor is completely independent of the Comal County District Attorney's Office.
4. *The Court of Appeals has found that Reimer engaged in prosecutorial misconduct and suborned perjury. That finding is binding upon this Court and is accepted herein and that finding serves as a basis for this Court's conclusions of law.* See generally, *Davis v. State*, 831 S.W.2d 426 (Tex.App.– Austin 1992, pet. ref'd).

6.(...continued) dissenting opinion in *Bauder v. State*, 921 S.W.2d 696, 703 (Tex.Cr.App. 1996) (McCormick, P. J., dissenting), which garnered only one vote, his own and, therefore, is void of any precedential value.

5. Reimer presented the following facts to the jury in Applicant's trial:

a. Certain evidence was not tested because of the cost to Comal County. This statement was incorrect because Comal County only paid for Zain's testimony.

b. That the police investigation was excellently conducted and outstanding while before the trial he wrote New Braunfels city officials complaining of the lost evidence and negligence of the police investigation.

These findings, while accurate, do not fully state the scope of egregious misconduct committed by Reimer.

In suborning perjury, Reimer coerced and threatened Carolyn Toth, a witness for the *State*, Toth testified she saw appellant and the victim's sister exchange an embrace after the body was discovered. *Davis I*, 831 S.W.2d at 435. Reimer, feeling this testimony damaged the State's case, ordered a police officer to contact Toth. *Id.*, at 436. Toth ultimately arrived at the district attorney's office and was told by Reimer there was a conflict between her testimony and that of other witnesses. Reimer told Toth:

> ... that if he could not resolve this conflict he would present the matter to the grand jury; and that if the officers had lied, he would indict the officers, or "the reverse if she had not told the truth." He also told her that he had "already put one person in jail for lying on the stand last year." He said he then asked her if she might have been mistaken about having seen a completed embrace. She said she had been mistaken.

Id. Reimer also directed Toth to testify that *she* had called him about changing her testimony. *Id.*, at 437. The next day, Toth was again called to the stand where she changed her testimony to conform with Reimer's mandate. *Id.*, at 436. When cross-examined, Toth denied being coerced to change her testimony. *Id.*

After Toth was recalled as a witness, but before the end of the trial, the defense learned Reimer had threatened Toth with a grand jury indictment for perjury. At that point, the defense moved for a mistrial on the ground of prosecutorial misconduct. *Id.* The trial judge conducted a hearing outside the presence of the jury. *Id.* Toth was given immunity and testified she had only changed her testimony because of Reimer's threats. *Id.*, at 436. She further testified the district attorney's manner frightened and intimidated her and she feared going to jail unless she changed her testimony. *Id.* On cross-examination by the State, Toth testified she was fearful when Reimer showed up where she lived and thoroughly frightened by a police officer who attempted to get her to "ride into the country with him." *Id.* After this hearing, the trial judge concluded "that there had not been prosecutorial misconduct that would justify a mistrial." *Id.*, at 437. The trial judge instructed the jury to ignore Toth's second round of testimony. *Id.*

The appellate court summarized the damage to the credibility of Toth: "In light of Toth's changing stories, we think it likely that the court's instruction to ignore *part* of her testimony had the effect of convincing at least some jurors that she was simply not a credible witness and that *all* of her testimony should be ignored." *Id.*, at 439 (emphasis in original).

Equally outrageous is the conduct of the State's forensics expert, Fred Zain. The unreliability of Zain's expertise was not made known until after the reversal. Although Zain invoked his Fifth Amendment privilege against self-incrimination at the hearing on appellant's pretrial writ of habeas corpus, the habeas judge made the following pertinent findings of fact:

1. Fred Zain was an employee of the Bexar County Forensic Science Center who testified for the State in Applicant's trial.

2. Comal County paid the Bexar County Medical Examiner for Zain's services as an expert witness and not for the performance of any scientific testing of evidence in Applicant's trial.

3. Zain testified at the trial that he performed the scientific tests on blood and other evidence in connection with this case.

4. Zain did in fact *not* conduct the DNA tests noted in his report.

5. It is highly probable that *Zain committed aggravated perjury* in testifying at Applicant's trial concerning the results of some or all of the scientific tests he said he conducted. Specifically, *Zain committed aggravated perjury* in the following ways:

   a. He testified that he had personally conducted scientific tests when in fact he did not.

   b. He testified that certain pieces of physical evidence contained Applicant's blood when in fact he knew or should have known that these pieces of evidence did not contain Applicant's blood.

6. Zain is not credible under oath.

7. At the hearing on Applicant's application for writ of habeas corpus, Zain invoked his right against self incrimination as guaranteed by the Fifth Amendment after being admonished of his rights by the trial court and after admitting that his employment had been terminated because of evidence in his possession being lost.

8. Zain's *scientific evidence was not reliable.*

9. Zain's reports and testimony served as the basis for the opinions, testimony and conclusions of Lt. Ed Richards.

10. The State's theory of prosecution was premised on the testimony of Lt. Richards and Zain. Zain misled Lt. Richards regarding the forensic facts, thus causing Lt. Richards' testimony and conclusions to be probably inaccurate.

11. *Zain was employed by the Comal County District Attorney to conduct the serology testing of the evidence in this case.*

12. Zain's *conduct was intentional and outrageous and shocked the conscience of the court.*

13. The Court is familiar with the holdings of the West Virginia Supreme Court *in The Matter of the West Virginia State Police State Police Crime Laboratory Serology Division*, No. 93-Misc.-402 [190 W.Va. 321, 438 S.E.2d 501] (W.Va. Nov. 10, 1993) (not yet reported). The Court agrees with the general factfindings of the West Virginia Supreme Court concerning Zain's competence, abilities and reliability and finds that there is a significant danger that similar conduct occurred in Texas.

14. Zain was terminated from the Bexar County Forensic Science Center for mishandling of evidence and because of the result of Dr. Stone's audit.

Davis II, 893 S.W.2d at 258-259. Again, the findings do not fully represent the extent of the misconduct.

Zain testified that appellant's blood was on physical evidence when it was not. There were no eyewitnesses to this crime, therefore Zain's testimony was critical to the State's case. And, it was based entirely on lies. Beyond Zain's obviously perjured testimony, there were other irregularities with the evidence. Crucial hair evidence was lost, a crucial tape perhaps exculpating appellant was erased by the New Braunfels police and blood samples were improperly stored. *Id.*, at 259.

The Court of Appeals determined the actions of Reimer denied appellant a fair trial and violated appellant's due process rights. *Davis I*, 831 S.W.2d at 439. In sum, perjured testimony was presented at the behest of Reimer. *Id.*, at 438. The scientific evidence presented at trial was completely unreliable. *Davis II*, 893 S.W.2d at 258. Possible exculpatory evidence was destroyed by the police. *Davis I*, 831 S.W.2d at 442. It is almost incomprehensible the lengths Comal County went to in order to convict appellant. And the State readily *admits* intentionally committing misconduct in their attempt to convict appellant. The State actively deprived appellant of his opportunity for a fair trial.

After Reimer coerced Toth to change her testimony, appellant moved for a mistrial. The trial court ruled the prosecutorial misconduct did not justify a mistrial. That decision was reversed by the Court of Appeals. *Id.*, 832 S.W.2d at 439-440. The trial judge's erroneous decision was reversed.[7]

V.
Analysis

The majority follows the lead of the Court of Appeals in holding the Texas Constitution does not prevent retrial after reversal for prosecutorial misconduct. *Ante*, at _____; slip op. pg. 11. In reaching this holding the majority states: "Appellant has not directed us to any cases, however, where the Supreme Court has explicitly extended *Oregon v. Kennedy* to apply to instances where verdicts of guilty have been reversed on appeal due to prosecutorial misconduct, and therefore holding retrials as jeopardy barred." *Ante*, at_____; slip op. pg. 7.[8] In other words, because appellant cannot

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7. The concurring opinion states the prosecutorial misconduct may not be "easily defined," *ante*, at____; slip op. pg. 2 (McCormick, P. J., concurring), I pause to note that every judge who has been involved with this case has not only easily recognized the misconduct but openly condemned the misconduct.

8. The majority also states that it is not clear the State knew or should have known Zain' testimony was false. *Ante*, at_____; slip op. pg. 6. This statement is incorrect for at least two reasons. First, there is evidence Reimer knew Zain had not conducted any of the DNA tests which he testified about. *Davis II*, 893 S.W.2d at 259. Second, even if Reimer did not know the testimony was false, Reimer had imputed knowledge of the falsity because Zain was the State's forensic expert and, therefore, a part of the prosecutorial team. In *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972), the Supreme Court held in certain circumstances, knowledge of perjured testimony may be imputed to the prosecutor who lacks actual knowledge of the falsity. In *Ex parte Adams*, 768 S.W.2d 281, 292 (Tex.Cr.App. 1989), the Court "declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel." As such, Reimer was responsible for Zain's conduct. *See also, Ex parte Castellano*, 863 S.W.2d 476 (Tex.Cr.App. 1993) (Off duty peace officer who was not assigned to an arson case but took it upon himself to assist and engage in perjury was a part of the prosecutorial team.). Under this rationale the State is responsible for the evidence in its case. In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), the Supreme Court held:

(Continued . . .)

cite a case directly on point, he loses. That type of rationale is devoid of reason and reflects poorly on any court of last resort.

The majority fails to recognize the jurisdictions that have extended *Kennedy* did not have a Supreme Court opinion on point to *justify* their extension. What those jurisdictions did have was a grasp of the problems inherent in not extending *Kennedy* For example, the Pennsylvania Supreme Court correctly recognized that this type of prosecutorial misconduct was not an inevitable part of the trial process, but was instead a breakdown of the integrity of the judicial proceeding that the double jeopardy clause was designed to protect against. *Smith,* 615 A.2d at 324. And, the Fifth Circuit has noted that "extreme tactics which constitute prosecutorial overreaching offend the double jeopardy clause." *Robinson,* 686 F.2d at 308.

Moreover, this Court did not have a case directly on point when it decided and held the harm incurred when the prosecution engages in misconduct to deprive a defendant of a fair trial, is the type of harm art. I, § 9 is meant to protect against. And, when this occurs, the prosecution should bear the responsibility for denying the defendant a fair trial:

> ... Under such circumstances, mistrial is not a necessary concession to the exigencies of trial, nor the unavoidable consequences of events beyond the prosecutor's control, but an immediate result of

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8. (...continued)

> ... This in turn means that *the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf* in the case ... Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Id., at 1567-1568. *See also, Zule v. State,* 802 S.W.2d 28, 33 (Tex.App.– Corpus Christi 1990) (The State is responsible for disclosing favorable evidence known by its agents, including police officers, even if the particular evidence is not known to the prosecuting attorney.).

> conditions produced by the government's representative which force upon a defendant the expense and embarrassment of another trial unless he is willing to accept an incurable unfair one. *When this happens, we think the government should bear the responsibility for denying the defendant his right, secured by the Texas Double Jeopardy Clause, to be tried in a single proceeding by the jury first selected.*

Bauder, 921 S.W.2d at 690.

The Double Jeopardy Clause has evolved from its simplest understanding to the cases discussed here in section II., *supra*. The protections for the defendant are based on fundamental principles of fairness; to protect against the power of the state and not subject any individual to repeated attempts at conviction causing undue burden, expense and anxiety. *Burks v. United States* held a defendant could not be retried if an appellate court held there was insufficient evidence, because the State had previously "been given one fair opportunity to offer whatever proof it could assemble." *Burks*, 437 U.S. at 16, 98 S.Ct. at 2149-2150.

In the instant case, the prosecution had their day in court. On that day, the prosecutor stood before twelve jurors and represented every individual in this State, and was given the opportunity to offer whatever proof could be assembled. The State chose not to be fair, but to engage in egregious misconduct. Had the trial judge correctly granted a mistrial, further prosecution would have been jeopardy barred. *Bauder v. State*, *supra*.

However, the majority holds there is no double jeopardy violation because there was not a mistrial, only a reversal. But, there is no rationale for this type of distinction. *United States v. Wallach*, 979 F.2d at 916; *and, Connecticut v. Colton*, 663 A.2d at 347. If the requested mistrial was erroneously denied and that error is found on appeal, why should the defendant be subjected to retrial? Why should a defendant, due to an *incorrect* ruling by the trial judge, lose this constitutional protection? It is simply inconceivable that the valuable double jeopardy protections suddenly

vanish when the case enters the appellate process.[9] The right of a defendant to be free from double jeopardy should not be determined by which court *correctly* determines that misconduct infected the trial. *See, Singer,* 785 F.2d at 239. A constitutional *guarantee* should not morph into a "non-right" depending upon the point in the judicial process an individual finds himself. The trial judge, through an erroneous ruling, should not be allowed to forfeit an individual's valuable constitutional right. Accordingly, I would hold art. I, § 9 of the Texas Constitution bars retrial following the erroneous denial of a motion for mistrial based on prosecutorial misconduct.

Conclusion

"The genius of the Constitution resides not in any static meaning that it had in a world that is dead and gone, but in its adaptability to interpretations of its greatest principles that cope with current problems and current needs." William J. Brennan, *Constitutional Adjudication,* 40 Notre Dame Law, 559, 568 (1965).[10] The guarantees inherent in our Constitution mirror what we as a society respect and revere, and what we live and die for. What we refuse to tolerate oftentimes speaks volumes more about our government's concept of freedom and ordered liberty than what we accept.

The State openly admits it engaged in egregious misconduct in order to convict appellant. (State's brief pp. 13, 18.) This misconduct shakes

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9. *See, Stone v. Powell,* 428 U.S. 465, 511, 96 S.Ct. 3037, 3060 (1976) (Brennan, J., dissenting).

10. Judge McCormick spends a large portion of his concurrence in an *ad hominem* attack on Justice Brennan who died less than two months ago. Rather than respond in kind, I refer the reader to the comments of Chief Justice Rehnquist upon Justice Brennan's retirement:

> The enduring legacy of Justice Brennan – the high value which he placed on claims of individual constitutional rights asserted against the authority of majoritarian self-government – is in no danger of being forgotten or disregarded simply because he has left the bench.

Future historians and jurists may disagree as to Justice Brennan's legacy, but foremost he was a man who served this country admirably for many years.

the very foundation upon which our system of justice rests. I would expect condemnation from every member of this Court. Instead, the majority refers to "reprehensible" actions by the prosecutor, *Ante*, at_____; slip op. pg. 9, but blindly affirms the judgment of the Court of Appeals. To hold the Double Jeopardy Clause is *not* violated when the State intentionally commits prosecutorial misconduct invites the prosecution to go as far as it wishes, knowing the only sanction it faces is a new trial – a second bite at the apple. *See, Rios*, 637 F.2d at 731 (McKay, J., dissenting). But, affording the State a second opportunity to convict under these circumstances is *exactly* what the Fifth Amendment is supposed to protect against. Moreover, the retrial sanction begs the question: if in the first instance the State was willing to commit misconduct in order to improperly convict, why would the State stray from that path a second time?

Believing appellant's retrial is jeopardy barred under art. I, § 9 of the Texas Constitution, I would reverse the judgment of the Court of Appeals. Because the majority does not, I dissent.

BAIRD, Judge

(Delivered September 17, 1997)
En banc
Publish